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No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ROSE ACRE FARMS, INC.,
Petitioner,

v.

EDWARD MADIGAN, SECRETARY OF AGRICULTURE OF THE UNITED STATES, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether a court, reviewing a challenge under the Administrative Procedure Act to the validity of regulations that require the destruction of private property, should sustain the challenge when the administrative agency promulgated the regulations based on the erroneous conclusion that neither the governing statute nor the Fifth Amendment require compensation to property owners.

(2) Whether a court should remand regulations to the administrative agency that promulgated them when the regulations contain invalid provisions and the administrative record does not establish that the agency would have promulgated the other portions of the regulations without the invalid provisions.

(3) Whether a district court, instead of the United States Claims Court, has authority to declare contrary to law an administrative rule against paying statutorily-required compensation for property destroyed by an administrative program.

PARTIES BELOW

The parties to the proceedings below were the petitioner, Rose Acre Farms, Inc. ("Rose Acre"), and the respondents, Edward Madigan, Secretary of Agriculture of the United States, Robert Melland, Administrator, Animal and Plant Health Inspection Service of the United States Department of Agriculture, and the United States Department of Agriculture (hereinafter collectively referred to as the "Secretary"). Rose Acre was the plaintiff-appellee below, and the Secretary was defendant-appellant. Rose Acre is an Indiana corporation engaged in the production of eggs. Rose Acre has no corporate parent and no subsidiaries that are not wholly-owned.

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PETITION FOR A WRIT OF CERTIORARI

Rose Acre respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on February 10, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 956 F.2d 670. App. 1a-14a. The Court of Appeals' order denying Rose Acre's Petition for Rehearing is reproduced in the Appendix. App. 50a. The opinion of the United States District Court for the Southern District of Indiana issued on June 5, 1991, as amended, is not reported; it is reproduced in the Appendix. App. 15a-46a.

JURISDICTION

Rose Acre invokes jurisdiction to review the judgment below pursuant to 28 U.S.C. § 1254(1). The Court of Appeals entered the judgment reversing the judgment of the District Court on February 10, 1992. App. 1a. On February 26, 1992, the Court of Appeals denied Rose Acre's timely Petition for Rehearing. App. 50a. This petition is timely, having been filed within 90 days of the date upon which the Court of Appeals denied a timely Petition for Rehearing.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The pertinent Constitutional provisions (Constitution of the United States, Fifth Amendment), federal statutes (5 U.S.C. §§ 702, 704 and 706; 21 U.S.C. § 134a; and 28 U.S.C. § 1491) and regulations (9 C.F.R. §§ 71.3 and 82.30-82.38) are set forth in Appendix D.

STATEMENT OF THE CASE

1. *The Administrative Proceedings*

On February 16, 1990, the Secretary promulgated an interim rule restricting the interstate movement of eggs, chickens and other articles believed by the Secretary to contain a bacteria called *salmonella enteritidis* serotype *enteritidis* (or "SE"). 55 Fed. Reg. 5576 (codified at 9 C.F.R. §§ 71.3(c)(3) and 82.30-82.36). When ingested by humans, SE can cause flu-like symptoms, including diarrhea and vomiting.[1] Under the interim regulations,

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[1] The SE bacteria has been found in many different animal species for many years. 7th Cir. App. 71; 7th Cir. Supp. App. 49. Indeed, according to the Secretary, "SE is not highly host specific; it affects many species in addition to chickens. The *Salmonella* organism is ubiquitous in the environment, and eradication of the bacterium is impossible." 56 Fed. Reg. at 3731. In fact, the Secretary estimates that as many as 50% of broiler chickens are contaminated with salmonella. 7th Cir. App. 111-12. But the risk of

restricted eggs could be moved interstate only for pasteurization (a process that results in a heat-treated, liquid egg product). 55 Fed. Reg. at 5584.

Several comments on the interim regulations asked the Secretary to authorize indemnity payments for restricted eggs because of the devastating economic impact of the restrictions imposed by the regulations. 56 Fed. Reg. at 3731. Other comments requested that the Secretary exercise his authority (a) under 21 U.S.C. § 114a to request that farmers voluntarily depopulate chickens carrying the SE bacteria or (b) under 21 U.S.C. § 134a to order farmers to depopulate such chickens. *Id.* Action under either statutory section would have required the Secretary to pay compensation for the destroyed articles.

After considering the comments on the interim rule, the Secretary revised the regulations and made them final on January 30, 1991 (the "SE Regulations"). 56 Fed. Reg. 3730. The final SE Regulations allow egg producers to ship restricted eggs for export, pasteurization and hardboiling. 56 Fed. Reg. at 3741.

In response to comments, the Secretary issued as part of the statement of basis and purpose for the final SE Regulations his decision not to include an indemnity provision in the regulations. The Secretary explained that, in his opinion, the regulations do not require depopulation (slaughter) of hens and therefore do not trigger the indemnity requirement in Section 134a. *Id.* In addition, the Secretary concluded that the emergency conditions that must exist before the Secretary may order destruction under Section 134a simply do not exist with respect to SE. The Secretary, therefore, declined to order explicitly the depopulation of the restricted chickens. *Id.*

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contracting SE from eggs appears to be very low. According to the Secretary's expert at trial, there is only one reported outbreak of SE in humans for every two billion eggs consumed. 7th Cir. App. 98, 110.

After an extensive discussion of his reasons for rejecting compensation, the Secretary declared:

> For the reasons stated above, APHIS does not intend to authorize payments of claims for chickens voluntarily destroyed, to order mandatory depopulation of infected chicken flocks and pay indemnities to the owners of destroyed chickens, or to make indemnity payments for eggs sold for pasteurization.

56 Fed. Reg. at 3731-32.

2. *The District Court Decision*

In the fall of 1990, the Secretary imposed restrictions under the SE Regulations on three farms owned by petitioner Rose Acre.[2] On December 28, 1990, Rose Acre filed an action in the United States District Court for the Southern District of Indiana, seeking a judicial declaration that the SE Regulations are invalid and an injunction against enforcement of the SE Regulations.[3]

Rose Acre brought the action for one reason: to prevent further irreparable harm to Rose Acre. Rose Acre argued that the regulations are invalid on several grounds, including lack of Due Process, violation of the requirement of notice and comment rulemaking under the Administrative Procedure Act (APA) (5 U.S.C. § 553), and lack of statutory authority. Rose Acre also claimed, and the District Court held, that the Secretary effectively ordered the destruction of chickens and eggs through the SE Regulations without declaring the statutorily required emergency. Rose Acre demonstrated that the restrictions

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[2] Rose Acre challenged the regulations because they were not rationally related to protecting human health. In fact, testimony from Rose Acre employees demonstrated that during the months between the time of the outbreaks allegedly linked to Rose Acre and the time that the Secretary imposed the restrictions, Rose Acre sold 218 million eggs from the implicated farms *without further incident*. 7th Cir. Supp. 29-31.

[3] The District Court had jurisdiction pursuant to 28 U.S.C. § 1331.

forced Rose Acre to sell its eggs at substantially below cost.[4] The District Court concluded that the Secretary was attempting to circumvent 21 U.S.C. § 134a by imposing restrictions that were tantamount to an order of destruction, even though the administrative record established that conditions did not warrant mandatory destruction,[5] explaining:

> USDA is basically withholding a declaration of an emergency while imposing restrictions as if it had declared an emergency. By labelling certain houses "test" and "infected" [and imposing restrictions on the associated chickens and eggs], USDA effectively condemns the eggs produced in those houses to be sold at less than cost. Chickens are destroyed in the testing process, and are destroyed as to their economic value when they are part of a house labelled "infected." As Rose Acre asserts, if USDA effectively orders the destruction of animals by eliminating their economic value, it cannot avoid the obligation to compensate owners by claiming that there is no "extraordinary emergency."

App. 45a.

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[4] The unrebutted evidence at trial demonstrated that, from October 1, 1990, through March 31, 1991, the average market price for shell eggs was 68 cents per dozen, Rose Acre's average production costs were 48 cents per dozen, and the average price Rose Acre received for its restricted eggs was 43 cents per dozen. 7th Cir. Supp. App. 32-34; 7th Cir. App. 50-51. The price is low because the pasteurization market is a salvage market for eggs that cannot be sold for human consumption as table eggs and because when pasteurization facilities know that a producer like Rose Acre *must* sell its eggs in the pasteurization market, the pasteurizers offer a price below the prevailing price for pasteurization eggs. 7th Cir. Supp. App. 86, 105. Moreover, many pasteurizers will not buy Rose Acre's restricted eggs *at all* because many food retailers refuse to buy pasteurized eggs made from restricted eggs, even though the Secretary believes such eggs to be safe. 7th Cir. Supp. App. 24-25, 133-34.

[5] The Secretary's own expert testified at trial that the only way out of the restrictions imposed under the SE Regulations is to depopulate the flock. 7th Cir. App. 115; *see also* 7th Cir. Supp. App. 135.

The District Court held that the agency's decision not to pay compensation under the SE Regulations is contrary to law. After a thorough analysis of the case law, the District Court found that the Secretary's declaration that he would not amend the regulations to include a compensation provision constituted a rule for purposes of judicial review. The District Court also found from its review of the administrative record that "[t]he record indicates that the agency may not have established such a scheme if it had also had to plan on indemnifying the flock owners." App. 45a. The court concluded that the Secretary's rule of no indemnification is bound up inextricably with the other substantive provisions of the SE Regulations. On the basis of this analysis of severability, the District Court declared the SE Regulations invalid in their entirety and enjoined the Secretary from enforcing the regulations against Rose Acre.

3. *The Court of Appeals' Decision*

The Secretary appealed the District Court's decision. On appeal, the Secretary did not challenge the District Court's analysis or its conclusion that the Secretary's declaration of no indemnification constituted a rule for purposes of judicial review. Nor did the Secretary dispute the District Court's conclusion that the agency might not have established a regulatory scheme requiring the destruction of birds and eggs if the Secretary had believed that the agency is required by statute to provide compensation to affected flock owners. Rather, the Secretary argued principally that the District Court lacked jurisdiction to hear Rose Acre's claim and that the SE Regulations are not tantamount to an order of destruction.

The Court of Appeals reversed the District Court's judgment. Although the Court of Appeals rejected the Secretary's jurisdictional argument, the court declined to address the Secretary's second argument because the court concluded that the District Court's remedy was

improper.[6] The Court of Appeals acknowledged that before issuing the regulations, "the Secretary concluded that neither the Constitution nor a statute requires compensation." App. 4a (citing 56 Fed. Reg. at 3731-32). But the Court of Appeals also opined that if, contrary to the Secretary's conclusion in promulgating the regulation, either Section 134a or the Constitution in fact requires compensation, the "right way to proceed" is for a court to order payment, and not to enjoin the Secretary from enforcing the SE Regulations. *Id.* at 5a. In the Court of Appeals' view, if the Constitution or statute requires compensation, "then setting aside the regulation is the wrong remedy. Compensation is the right one." *Id.* at 6a.

The Court of Appeals dismissed as a "litigating position" the Secretary's response to comments in which he announced his decision not to revise the SE Regulations to provide for compensation. *Id.* at 7a. The Court of Appeals reasoned that whether the Secretary is right or wrong with respect to his conclusion that neither the Fifth Amendment nor the statute requires compensation, "[e]ither way, it is inappropriate to halt the regulatory program." *Id.* at 7a. The Court of Appeals concluded that even if the District Court were correct and the Secretary's decision not to pay compensation is a rule with the force of law, "the appropriate remedy is to excise the offending text, and the appropriate surgeon is the claims court." *Id.* at 7a. The Court of Appeals then stated, "It is to the claims court that Congress has entrusted the task of determining whether a statute or the Constitution requires compensation. It is to the claims court that Rose Acre must go." *Id.* at 8a.

The Court of Appeals did not address the District Court's analysis of severability or the District Court's

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[6] The Court of Appeals, nonetheless, suggested that the Secretary was wrong in limiting his interpretation of the word "destroyed" to the literal, physical annihilation of the eggs and chickens. *See* App. 4a.

finding that the Secretary might not have promulgated the challenged regulations if the Secretary had correctly understood that compensation is a statutorily required element of such a program. The Court of Appeals then rejected Rose Acre's other challenges to the regulations, including its claim that the regulations are not rationally related to disease control. In doing so, the Court of Appeals criticized the District Court for conducting any hearing at all, and repeatedly invoked the principle of deference to administrative agency determinations. *E.g.*, *Id.* at 9a ("Congress called for the judgment of the Secretary, not the judgment of a court, on the appropriate response to diseases carried by animals.").

REASONS FOR GRANTING THE WRIT

This case presents an interesting vehicle for the Court to clarify the appropriate role of courts in reviewing administrative agency actions. Courts routinely struggle with determining under what circumstances a regulation should be declared unlawful as not supported by the record. While the dogma is clear that policy decisions and scientific judgments are for regulators to formulate, this case illustrates how courts can make fundamental policy decisions under the guise of legal analysis, while at the same time paying lip service to deference to administrative decision-making.

At the outset of the agency's consideration of the regulations at issue, the Secretary conducted a cost/benefit analysis. Such analysis goes to the very heart of policy-making and the administrative function. After reviewing policy options that included an expensive proposal from the United States Food and Drug Administration to test all egg-laying chicken flocks for SE, the Secretary designed a regulatory scheme that, in the opinion of the Secretary, would not require the expenditure of increasingly scarce public funds to indemnify owners whose flocks are restricted under the regulations. After holding that the Secretary's conclusion that he did not have to

pay compensation as a part of the regulations was contrary to law, the District Court reviewed the administrative record and concluded that the Secretary might not have implemented the regulatory scheme if he had known that compensation is required. As a result, the District Court invalidated the regulations, sending the matter back to the agency to decide whether to proceed with the regulatory scheme, even if the government has to pay for the chickens and eggs destroyed under its provisions.

The Court of Appeals, on the other hand, emphatically believed that there was a "right" legal answer to this quintessential policy question. In the Court of Appeals' opinion, it would be "inappropriate to halt the regulatory program" simply because public funds, rather than private funds, would have to be used to pay for the destruction resulting from the program. But the Secretary never made the decision to go forward with the regulations on that basis. Sound principles of judicial review of administrative decision-making require that judges not make such decisions. However, the Court of Appeals did just that, in so doing, misconceived the nature of its role in reviewing the regulations at issue. Reconciling the conflicting policies involved and making the kinds of cost/benefit analyses that a regulator must make in allocating scarce public resources are not judicial functions.

This case also merits review to address the appropriate methodology a reviewing court should employ when confronted with a regulation containing an invalid provision. The Court of Appeals proceeded on the premise that if a portion of the regulations were invalid, the invalid provision could simply be excised even though the administrative record indicated that the regulatory scheme was based on the invalid provision. That proposition is squarely at odds with the decisions of this Court and at least one other court of appeals. This Court should take the opportunity to clarify the rules with respect to judicial severance of a portion of a regulation when the issue was not explicitly addressed by the administrative agency.

The decision below also presents the recurring issue of general importance of whether a district court has jurisdiction to declare a rule against compensation unlawful. The Court of Appeals apparently concluded that, because declaring unlawful the Secretary's rule against compensation might ultimately lead to the payment of money, the Claims Court should hear the challenge. That decision conflicts with this Court's decision in *Bowen v. Massachusetts*, 487 U.S. 879 (1988), and the decisions of the Courts of Appeals for the District of Columbia and Third Circuits.

I. THE COURT OF APPEALS IMPROPERLY RESOLVED FUNDAMENTAL POLICY ISSUES

The District Court identified two independent deficiencies in the administrative record for the SE Regulations. First, the SE Regulations are unlawful under 21 U.S.C. § 134a(a) and (b) because the regulations, in effect, order destruction of chickens and eggs even though the Secretary did not declare a state of emergency as required by Section 134a as a prerequisite to such an order of destruction. Second, the District Court held that the SE Regulations are unlawful because the Secretary based the design of the regulations on the erroneous assumption that the agency would not have to pay compensation to the flock owners.

The Court of Appeals' opinion is predicated on an alarmist characterization of the risks of salmonella.[7] App. 1a-2a. But the court's rhetoric about a public health emergency is unsupported—the Secretary's record explicitly rejects that characterization. 56 Fed. Reg. at 3731. In reversing the District Court, the Court of Appeals usurped the Secretary's administrative function (a) by disregarding the Secretary's position expressed in the administrative record that conditions do not warrant destruction of birds and eggs and (b) by deciding that it would be "inappropriate to halt the regulatory pro-

[7] *But see* notes 1 and 2 *supra*.

gram" if the agency must pay for the destruction resulting from the program, without allowing the agency to decide whether to halt or modify the program.

A. The Secretary's Finding that No Emergency Exists Precludes the Secretary From Ordering Destruction of Birds and Eggs

As the evidence at trial conclusively demonstrated and as the District Court held, the SE Regulations effectively destroy the economic value of the restricted chickens and eggs. App. 44a-45a; Appellee's Brief at 22-25. The Court of Appeals observed, without deciding the issue, that "[a]n 'alternative' that is less attractive financially than slaughter is the functional equivalent of a command to destroy the animals." App. 4a. The destruction ordered by the Secretary under the SE Regulations brings the regulations within the scope of 21 U.S.C. § 134a, which authorizes the Secretary to order destruction of animals and animal products only if certain emergency conditions exist. The Secretary, however, took the arbitrary position that the SE Regulations are not tantamount to an order of destruction and declared that emergency conditions do not exist with respect to SE.

1. *Subsections 134a(a) and (b) Limit The Secretary's Authority to Order Destruction*

Under subsections (a) and (b) of § 134a, the Secretary may order destruction of animals or animal products only if certain conditions exist. Under subsection 134a(a), the Secretary must find that destruction is necessary to prevent the interstate spread of a communcable disease and that the animals meet one of three additional criteria. Under the first criterion, the Secretary must find, among other findings, that the animals were handled contrary to a statute or regulation. Under the second and third criteria, the Secretary must find, *inter alia*, that the animals to be destroyed are moving, or have moved, interstate and are affected with, or were exposed to, "any communicable disease dangerous to livestock or poultry." Under subsection 134a(b), the Secretary must

find both the existence of an "extraordinary emergency" and that the states have responded inadequately to the emergency. These requirements of section 134a define the limited instances in which the Secretary may abandon the cooperative procedures of 21 U.S.C. § 114a to order destruction. *Loftin v. United States*, 6 Cl. Ct. 596 (1984), *aff'd*, 765 F.2d 1117 (Fed. Cir. 1985).

2. *The Secretary Concluded that SE Does Not Warrant Destruction Under Subsections 134a(a) and (b)*

In no uncertain terms, the Secretary concluded that circumstances justifying mandatory destruction of chickens and eggs under 21 U.S.C. § 134a(a) and (b) are *not* present in the case of SE. 56 Fed. Reg. at 3731. Although, according to the Secretary, SE does not justify destruction of birds and eggs under the standards of subsections 134a(a) and (b), the Secretary nonetheless promulgated the SE Regulatons because he arbitrarily contended that the restrictions imposed by the SE Regulations are not tantamount to an order of destruction under Section 134a. The Secretary concluded that SE does not *need* to meet the requirements of subsections 134a(a) and (b) for him to impose the restrictions contained in the SE Regulations. As the District Court correctly held, the Secretary's actions were arbitrary and contrary to law.

B. The Secretary Based His Design of the SE Regulations on the Assumption that the Agency Would Not Have to Pay for Chickens and Eggs Destroyed Under the Regulation

In designing the SE Regulations, the Secretary was required to and did analyze the cost of the proposed regulations.[8] The Secretary's proper goal was to obtain

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[8] Administrative agencies are required by executive order to consider whether their regulatory initiatives will result in a Fifth Amendment taking, thereby requiring compensation. Executive Order No. 12630 (March 15, 1988), 53 Fed. Reg. 8859 (March 18, 1988). A second executive order requires that each agency analyze

maximum benefits from his available enforcement dollars. While the District Court deferred to the Secretary's evaluation of the benefits of the SE Regulations, the District Court held that (1) the Secretary erroneously concluded that compensation was not due[9] and (2) the Secretary's error materially affected his design of the regulations. App. 45a. The District Court thus declared the regulations unlawful, forcing the Secretary to reconsider them in light of their true cost to the Treasury.[10]

Ignoring the administrative law issues, the Court of Appeals simply observed that the Fifth Amendment and 21 U.S.C. § 134a(d) do not require compensation as a prerequisite to a taking. That observation sidesteps the real issue and overlooks the operative subsections of the statute (*i.e.*, 21 U.S.C. § 134a(a) and (b)). The Court of Appeals sustained the validity of the regulation despite the fact that the Secretary's decision to impose the restrictions was based on a material error of law.[11] The

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the costs and benefits of its regulations. Executive Order No. 12291, Feb. 17, 1981, 46 Fed. Reg. 13193 (Feb. 19, 1981).

[9] The District Court held that the Secretary must pay compensation under both 21 U.S.C. § 134a and the Fifth Amendment to the Constitution of the United States.

[10] The Court of Appeals' decision runs counter to one of the purposes of the Fifth Amendment and Section 134a. In addition to ensuring just compensation, the Fifth Amendment and Section 134a operate as moderating forces on government takings by internalizing the cost of such takings. *See* R. Posner, *Economic Analysis of Law* § 3.5 (1977). If an agency is allowed to effect takings on the *mistaken* belief that compensation is not due, that function is lost.

[11] Relying on such cases as *Monsanto v. Ruckelshaus*, 467 U.S. 986 (1984), the Court of Appeals adopted the same approach as a court would use in determining whether a statutory taking contravenes the Fifth Amendment to the United States Constitution. But administrative agencies, unlike Congress, must provide an adequate statement of basis and purpose for their legislative enactments. A court must be able to review that statement of basis and purpose to make sure that the agency had a rational basis for its legislative rule. Because the Secretary did not believe that the restrictions

remedy for that deficiency is *not* compensation; the remedy to which Rose Acre is entitled under the APA is a declaration that the regulation is contrary to law and a remand to the Secretary to design a regulation that is consistent with the statute and the Constitution.

Thus far, the Secretary's key policy decision is that the various costs necessary to obtain the benefits of the regulations are justified *if* Rose Acre and the other egg producers are the entities that must pay those costs. The Secretary has not decided that the same program would be adopted if, contrary to the regulations, the United States Treasury must pay the costs of his regulatory scheme. The Court of Appeals may not make (and should not have made) that policy decision for him.

C. The Court of Appeals Judgment is Contrary to the Principle Established by this Court that Agencies, and not Courts, Should Make Policy Decisions and Scientific Judgments

In reversing the District Court's entry of a declaratory judgment, the Court of Appeals did not properly apply the principle that a regulation must be supported by the administrative record. *Bowen v. American Hospital Ass'n*, 476 U.S. 610, 626-27 (1986); *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43-50 (1983). As the District Court held, the SE Regulations are not supported by the record because, among other things, the Secretary explicitly found that the statutorily required emergency conditions do not exist. App. 44a-45a. Indeed, as a result of the Secretary's mistaken interpretation of the scope of section 134a, the Secretary himself explicitly found that circumstances do not warrant mandatory destruction.

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would require him to pay compensation, the Secretary obviously did not explain why the SE program is worth the resources necessary to compensate flock owners, and in the absence of that reasoning, the Court of Appeals may not make that policy decision for the Secretary.

The District Court also held that the regulations were based on the erroneous assumption that the agency would not have to pay compensation. If the Secretary wants to change his mind about the propriety of mandatory destruction in the case of SE (with the attendant obligation to pay compensation), he must explain in a statement of basis and purpose how SE now meets the requirements of subsections 134a(a) and (b) and why the restrictions are worth the cost to the agency. *Atchison T. & S.F. Ry. Co. v. Wichita Board of Trade*, 412 U.S. 800, 807-808 (1973); *Southwestern Electric Power Co. v. FERC*, 810 F.2d 289, 290 (D.C. Cir. 1987); *Independent U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 852 (D.C. Cir.), *cert. denied*, 484 U.S. 819 (1987).

The Court of Appeals was not free to make those determinations; the Secretary must make them. *Chevron USA v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 866 (1984) ("[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: 'Our Constitution vests such responsibilities in the political branches,'" (citation omitted). In this respect, the decision below does not represent merely an incorrect application of well-settled principles of law to the facts of a particular case. Rather, this case, properly analyzed, will demonstrate to the lower courts that *Chevron* is not a direction to rubber-stamp administrative determinations, but instead requires the art of judging to differentiate the decisions properly reserved to judges from policy questions that should be resolved by administrators.

The Court of Appeals took the position that the alleged inconsistency between the statutory mandate (which requires compensation) and the regulations purportedly promulgated to implement that statutory mandate (which do not provide compensation) does not present an obsta-

cle to implementation of the program. App. 6a-7a. This rather extraordinary position resulted from the Court of Appeals' fundamental policy choice that the program *should* proceed even if the agency must bear the cost. *Chevron*, however, above all emphasizes that the role of the reviewing court is to ensure that regulations are consistent with a clearly expressed statutory mandate. When that mandate delegates decision-making authority, *Chevron* mandates deference to reasonable policy choices that fill gaps left by Congress; when the mandate requires that a program be designed to contain certain features (*e.g.*, requiring compensation), it is the duty of the court to ensure that the administrator promulgates regulations that incorporate those features.

The courts must police the boundaries between legitimate administrative policy-making and administrative expedience. When an agency deviates from the statutory language that provides direction to the administrator in promulgating regulations, the proper remedy is to invalidate the regulatory scheme.[12]

II. THE PROPER REMEDY FOR THE SECRETARY'S UNLAWFUL RULE AGAINST PAYING COMPENSATION IS TO DECLARE THE SE REGULATIONS UNLAWFUL IN THEIR ENTIRETY

This case also involves the recurring question of the appropriate judicial response when confronted with a regulatory scheme containing an invalid provision. The District Court correctly held that the rule against com-

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[12] The courts remain the final authorities on issues of statutory construction and hence should not rubber-stamp administrative constructions and provisions that are inconsistent with the plain language of the statute or the statutory mandate or that defeat the obvious purpose that Congresss specifically sought to implement. *SEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981); *SEC v. Sloan*, 436 U.S. 103, 117-18 (1978); *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 745-46 (1973); *Volkswagenwerk v. FMC*, 390 U.S. 261, 272 (1968); *NLRB v. Brown*, 380 U.S. 278, 291 (1965); *FTC v. Colgate Palmolive Co.*, 380 U.S. 374, 385 (1965); *Social Security Board v. Nierotko*, 327 U.S. 358, 369 (1946).

pensation is inextricably bound to the other substantive provisions of the SE Regulations. App. 45a. The Court of Appeals held that if the Secretary's statement constitutes a rule,[13] the Claims Court could declare that rule unlawful and excise it from the rest of the SE Regulations. App. 7a. That holding is inconsistent with prior decisions of this Court and creates a conflict among the circuits on this fundamental question of judicial review of administrative agency action. The issue merits further analysis by this Court to provide principles to guide the lower courts on this important issue.

A. The Better Reasoned Cases Hold that the Administrative Record Must Support Severability Before a Court May Declare A Regulatory Scheme Only Partially Unlawful

In holding that the Claims Court could provide complete relief, the Court of Appeals failed to apply the proper test for deciding whether the Claims Court could sever the non-indemnification rule from the rest of the SE Regulations. The decision below asserts that the remedy for an invalid regulatory provision is simply to "excise" it, App. 7a, notwithstanding the uncontested District Court finding that the agency might not have adopted the regulations if the agency understood that public funds were required to compensate egg producers. The Court of Appeals apparently accepted the Secretary's

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[13] In Parts II and III of this Petition, petitioner assumes that the District Court correctly held that the Secretary's statement that the agency will not pay compensation constitues a rule. Because (1) the District Court went through exhaustive analysis in reaching its conclusion, (2) the Secretary did not challenge that conclusion on appeal and (3) the Court of Appeals merely rejected the District Court's analysis and authority without any analysis or authority of its own (App. 7a), Rose Acre need not spend much time on that issue here. The Secretary's statement that he would pay no indemnification came in the statement of basis for the SE Regulations, in response to several comments requesting that the Secretary revise the SE Regulations to include a compensation provision. Rose Acre is challenging the SE Regulations as a whole, including the lack of an indemnity provision in those regulations.

argument that, "the regulation . . . should be treated as severable unless: (1) there are affirmative indications of a contrary agency intent; or (2) severing the defective provision would impair the functioning of the underlying statute. *K-Mart Corp. v. Cartier*, 486 U.S. 281, 294 (1988)." Appellants' Brief at 47. But that statement of the law is incorrect. Although the discussion of this point in *K-Mart* is subject to different interpretations,[14] it should not be read to hold that there is a *presumption* that a court may sever a portion of a regulation unless the agency has expressed an "*affirmative*" indication that the agency intended the rules to be inseparable. Quite the contrary, this Court has held (when analyzing this issue in more depth than in *K-Mart*) that a court may *not* sever a portion of a regulation from the rest of a regulatory scheme unless the record establishes that the agency would have promulgated the lawful portions of the reglation even without the unlawful portions. *F.P.C. v. Idaho Power Co.*, 344 U.S. 17, 20-21 (1952); *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 618-19 (1944).

The better reasoned decisions of courts of appeals are diametrically opposed to the decision of the Seventh Circuit on this issue. In *North Carolina v. F.E.R.C.*, 730 F.2d 790, 796 (D.C. Cir. 1984), Judge (now Justice) Scalia wrote: "Where there is substantial doubt that the agency would have adopted the same disposition regarding the unchallenged portion if the challenged portion were subtracted, partial affirmance is improper." Indeed, for a court to sever a regulation under any other circumstance would be to invade the policy-making province of the agency. *McCullough Gas Processing Corp. v. Department of Energy*, 650 F.2d 1216, 1229-30 (Tem. Em. Ct. App. 1981). As with any instance in which a court corrects

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[14] The Court in *K-Mart* severed a portion of a regulation after observing that "[t]he severance and invalidation of this subsection will not impair the function of the statute as a whole, and there is no indication that the regulation would not have been passed but for its inclusion." 486 U.S. at 294.

an agency's error of law, if there is any question as to whether the agency would have proceeded with the regulation, the proper procedure is to remand the case to the agency. *See NLRB v. Enterprise Ass'n*, 429 U.S. 507, 522 n.9 (1977) ("When an administrative agency has made an error of law, the duty of the Court is to 'correct the error of law committed by that body, and, after doing so, to remand the case to the [agency] so as to afford it the opportunity of examining the evidence and finding the facts as required by law.'") (citation omitted). That is critical here because it is clear that the Secretary based the design of the SE Regulations on the assumption that he would not have to pay compensation.[15] After reviewing the administrative record, the District Court correctly held that there is substantial doubt that the Secretary would have adopted the regulatory scheme had he known that the government would have to pay compensation.[16]

B. Strong Policy Considerations Demand that a Court Show Restraint In Severing Portions of a Regulation

The test developed for determining the severability of statutory provisions is not the appropriate test for determining the severability of regulatory provisions. Unfortunately, a number of decisions employ the wrong test. *E.g., Faucher v. Federal Election Commission*, 928 F.2d 468, 472 (1st Cir.), *cert. denied*, 112 S. Ct. 79 (1991); *Massachusetts v. HHS*, 899 F.2d 53, 76 (1st Cir. 1990), *vacated on other grounds*, 111 S. Ct. 2252 (1991); *Community For Creative Non-Violence v. Turner*, 893 F.2d 1387, 1394 (D.C. Cir. 1990). The guiding principle in

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[15] *See* Part I, *supra*.

[16] The ultimate question for this Court is the same whether or not the Secretary's statement denying compensation in the preamble to the final SE Regulations constitutes a formal rule. In either case, the test is whether the record evidences the Secretary's intent to proceed with the SE Regulations in their present form even if he has to pay for the birds and eggs destroyed under those regulations. As explained above, it does not.

both cases is the intent of the enacting body, but there is a significant difference in the appropriate analysis. The necessity of an administrative record, including an adequate statement of basis and purpose, and a district court's power to remand a case to an agency for further proceedings, make a court's role more limited in the case of a regulation.[17]

Congress has required that agencies provide an adequate statement of basis and purpose for regulations. Therefore, when a court holds only a portion of a regulation invalid, it should be clear from the administrative record that the agency would have promulgated the remaining portions without the invalid portion. As with any regulation, the administrative record must support the remaining portions of the regulation. If there is ambiguity, the court should remand the case to the agency for further proceedings. The Court should take this opportunity to clarify the proper role for a court when fashioning a remedy for a regulation containing an invalid provision.

III. THE COURT OF APPEALS' HOLDING THAT A CHALLENGE TO THE SECRETARY'S RULE AGAINST COMPENSATION BELONGS IN THE CLAIMS COURT CONFLICTS WITH *BOWEN v. MASSACHUSETTS* AND WITH DECISIONS IN OTHER CIRCUITS

The final issue presents an opportunity for the Court to define further a district court's jurisdiction to declare contrary to law an agency's rule against payment of money. The Court of Appeals concluded that Rose Acre's challenge to the SE Regulations was within the District

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[17] In contrast, a statutory provision is presumed severable if what remains after severance is fully operative as law. *INS v. Chadha*, 462 U.S. 919, 934 (1983). Because the Constitution obviously does not require that Congress develop anything like an administrative record for its statutes, when a court decides whether to sever a portion of a statute, the court is not confronted with the question whether a record adequately supports the remaining portion of the statute. Moreover, courts may not remand statutes to Congress for further development of a record.

Court's jurisdiction. But after ruling that the Secretary's denial of compensation did not justify invalidating the SE Regulations in their entirety, the Court of Appeals further held that the Claims Court, and not the District Court, should hear Rose Acre's challenge to the Secretary's rule denying compensation.[18] The Court of Appeals' refusal to affirm even the portion of the District Court's judgment invalidating the Secretary's non-indemnification rule is squarely at odds with this Court's decision in *Bowen*. In this respect, it presents important recurring issues affecting a district court's jurisdiction resolved inconsistently by the courts of appeals.[19]

A. The Court of Appeals' Decision Is Inconsistent with *Bowen* and its Progeny

1. Bowen v. Massachusetts

The Claims Court has jurisdiction under the Tucker Act (28 U.S.C. § 1346) to hear claims for money damages over $10,000 against the United States and predicated on a constitutional provision, statute or regulation, among other things. *Bowen*, 487 U.S. at 910 n.48. Apparently relying on the Tucker Act, the Court of Appeals concluded that a challenge to the Secretary's rule against paying compensation belongs in the Claims Court. The reasoning of *Bowen*, however, explains why the District

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[18] Rose Acre filed a complaint in the United States Claims Court on May 5, 1992. That fact does not affect the merits of this petition because a favorable decision in the Claims Court will not render this case moot. The Claims Court cannot invalidate the SE Regulations and protect Rose Acre from further irreparable injury.

[19] This case presents important substantive issues as well. As the Secretary promulgates regulations in the future, he should have clear guidance regarding the circumstances under which he must compensate farmers for restrictions on movement and sales of animals and animal products. Restrictions such as those imposed under the SE Regulations can have a dramatic impact on farmers. For example, in the five months before trial, the Secretary required Rose Acre to divert 180 million eggs worth $10.2 million. 7th Cir. Supp. App. 32-33.

Court, not the Claims Court, had authority to declare the rule unlawful.

In *Bowen*, this Court addressed the question whether the Commonwealth of Massachusetts could challenge in a district court the decision of the Secretary of Health and Human Services to deny reimbursement for a particular program under Medicaid. The Court held that because the Commonwealth sought relief prospective in its effect and because the Claims Court could not provide an adequate remedy, the district court could properly consider the Commonwealth's claim.[20]

Like the plaintiff in *Bowen*, Rose Acre, as a part of its challenge to the validity of the SE Regulations, challenged the Secretary's rule denying indemnity. Also like the plaintiff in *Bowen*, Rose Acre sought declaratory relief as to the prospective operation of a rule, not a determination regarding any sum certain of money due Rose Acre for past injury. In this case, the District Court clearly had jurisdiction under *Bowen* to declare unlawful the rule against indemnification. And here, as in *Bowen*, "the doubtful and limited relief available in the Claims Court is not an adequate substitute for review in the District Court." *Bowen*, 487 U.S. at 901.

Indeed, the Court of Appeals' decision relegates Rose Acre to a manifestly inappropriate forum that lacks the basic authority to adjudicate the prospective challenges

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[20] Although the Court of Appeals' decision in this case is clearly inconsistent with this Court's decision in *Bowen*, several commentators have suggested that the jurisdiction of the Claims Court under *Bowen* is quite confusing. Fallon, *Claims Court at the Crossroads*, 40 Cath. U. L. Rev. 571 (1991); Noone and Lester, *Defining Tucker Act Jurisdiction After Bowen v. Massachusetts*, 40 Cath. U.L. Rev. 571 (1991); Sisk, *Two Proposals to Clarify the Tucker Act Jurisdiction of the Claims Court*, 37 Fed. Bar News & J. 47 (1990); Webster, *Choice of Forum in Claims Litigation*, 37 Fed. Bar News & J. 534 (1990); Bowman, *Bowen v. Massachusetts: The "Money Damages Exception" to the Administrative Procedure Act and Grant-in-Aid Litigation*, 21 Urb. Law. 557 (1989); Sisk, *Tucker Act Appeals to the Federal Circuit*, 36 Fed. B. News & J. 41 (1989).

that Rose Acre has advanced and to fashion appropriate equitable relief. As this Court explained in *Bowen*:

> The Claims Court does not have the general equitable powers of a district court to grant prospective relief. Indeed, we have stated categorically that "the Court of Claims has no power to grant equitable relief."

Bowen, 487 U.S. at 905 (footnote and citation omitted).

2. *Decisions by the District of Columbia and Third Circuits*

Because other circuit courts of appeals have followed *Bowen*, the Court of Appeals' decision in this case creates a conflict among the circuits. The District of Columbia and the Third Circuits have confronted the question whether a district court has jurisdiction to hear a prospective challenge to an administrative determination that no compensation is due under a statute, and both circuits have held that a district court is the proper forum.[21]

In *Esch v. Yuetter*, 876 F.2d 976 (1989), the District of Columbia Circuit held that a district court could hear a challenge to the denial of benefits by the Secretary of Agriculture under two federal farm subsidy programs.[22]

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[21] Although it is a pre-*Bowen* case, the decision in *Sarasota v. EPA*, 799 F.2d 674 (11th Cir. 1986), follows the rationale of *Bowen* in holding that a challenge to the criteria for determining grant awards under the Federal Clean Water Act was properly considered by the district court, and not the Claims Court.

[22] The District of Columbia Circuit considered another challenge to a regulation denying compensation in *Beverly Hospital v. Bowen*, 872 F.2d 483 (D.C. Cir. 1989). There, several hospitals brought an action challenging a regulation of the Secretary of Health and Human Services ("HHS") that deny compensation under Medicaid for copying costs related to patient records. The district court found the regulation unlawful under the Medicaid statute. The question presented in that case was not whether the court could hear the challenge, but whether the court should go one step further and order HHS to pay money for copying costs previously incurred by the hospitals. Interpreting this Court's decision in *Bowen*, the court of appeals held that the district court should ensure that HHS paid compensation for copying costs previously incurred.

The plaintiffs in *Esch* contested the Secretary's determination that they qualified as only one- and two-person farms for certain price support and set-aside programs, respectively, rather than as a nine-person farm. *Esch*, 876 F.2d at 988; *see also, Esch v. Lyng*, 665 F. Supp. 6 (D.D.C. 1987). The Court of Appeals held that the district court had jurisdiction of the claim under *Bowen*. *Esch*, 876 F.2d at 985.[23]

The Third Circuit likewise agrees that, under *Bowen*, a plaintiff may challenge a regulation that denies proper compensation. In *Zellous v. Broadhead Associates*, 906 F.2d 94 (3rd Cir. 1990), tenants brought an action against the United States Department of Housing and Urban Development ("HUD") to challenge HUD's determination not to make timely adjustments in a utilities allowance. HUD's decision not to adjust the allowance meant that the tenants had to pay higher rent than they were obligated to pay under the United States Housing Act of 1937. The tenants sought an injunction and declaratory relief requiring the government to increase the amount of reimbursement paid to landlords and directing reimbursement of expenses that HUD should have paid. The court concluded that, under *Bowen*, the relief sought was not money damages and, therefore, that the district court had jurisdiction.

The Court of Appeals' decision in this case is entirely inconsistent with *Esch* and *Zellous*. In the District of Columbia and Third Circuit cases, as in this case, the plaintiffs sought to correct a rule that denied them com-

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[23] District courts in the District of Columbia Circuit have followed the *Esch* decision, holding, for example, that a district court has jurisdiction to consider a prayer for a declaration of the plaintiff's entitlement to reimbursement of funds withheld under a farm subsidy program. *Peterson Farms I v. Madigan*, 782 F. Supp. 1 (D.D.C. 1991). The district court also has held that it has jurisdiction to hear the challenge by certain dairy farmers to the Secretary's denial of compensation under the Dairy Termination Program. *Vandervelde v. Yeutter*, 774 F. Supp. 645 (D.D.C. 1991).

pensation from a federal agency. Indeed, jurisdiction in this case is even clearer because a determination that the SE Regulations are tantamount to an order of destruction under Section 134a was only a part of the relief requested. Rose Acre sought a declaration under the APA that the SE Regulations are unlawful in their entirety for several reasons, including that the regulations are not rationally related to disease control. Even if the Court of Appeals had been correct in refusing to declare the SE Regulations unlawful in their entirety (and it was not), the Court should have followed *Bowen* and its progeny and affirmed the District Court's declaration that the non-indemnification rule is unlawful.

B. Rose Acre's Claim Presents Important Federal Procedural Issues

Confusion about which court has jurisdiction over a particular category of claims can waste judicial resources. As Justice Scalia observed in his dissent in *Bowen*, nothing is more wasteful than litigating about where to litigate. *Bowen*, 487 U.S. at 930 (Scalia, J., joined by Rehnquist, C.J., and Kennedy, J., dissenting). This case is a good example. The Court of Appeals agreed that Rose Acre properly could bring its claim in District Court and ruled against Rose Acre on the merits of several arguments. However, the Court of Appeals refused to affirm even the portion of the District Court's decision pertaining to the compensation rule and would have Rose Acre relitigate the issue in the Claims Court, resulting in inefficient claim splitting.

The Court of Appeals' decision will cause confusion for parties seeking to challenge an agency's rule against paying money, in part because the Court of Appeals did not clearly establish any principle with respect to when declaratory relief, rather than damages from the Claims Court, is appropriate. In holding that the District Court may not declare unlawful the rule against indemnification, the Court of Appeals seemed to base its decision on the

fact that such a holding might, in effect, ultimately lead to the payment of money. That approach is erroneous.

There is no reason to believe that the Claims Court has any special expertise in deciding claims based on the Secretary's complex agricultural subsidy and compensation programs. Indeed, *Bowen* recognizes that district courts are better suited to resolve claims involving such complex and ongoing programs. *Bowen*, 487 U.S. at 907-08.[24]

Ultimately, the

> "question whether the District Court has the power to enter the order it did is governed by the plain language of 5 U.S.C. 706. It seems perfectly clear that, as 'the reviewing court,' the District Court had the authority to 'hold unlawful and set aside agency action' that it found to be 'not in accordance with law.' "

Bowen, 487 U.S. at 911. (footnote omitted). The Court of Appeals' judgment to the contrary incorrectly decided a recurring question of general importance in a manner inconsistent with decisions in other circuits.

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[24] The District Court is also a more appropriate forum in which to hold a hearing on the issues presented by such challenges. The Court of Appeals' criticism of the District Court in this case for holding a hearing, *see* App. 10a, is unfounded and based on an incorrect statement of the law. The District Court properly recognized that " 'the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.' " App. 22a. (quoting *Florida Power and Light Co. v. Lorion*, 470 U.S. 729, 743 (1985)). The District Court canvassed the relevant case law, finding situations in which evidentiary hearings are appropriate, including, *inter alia*, when the reviewing court needs additional evidence to assist it in understanding the technical issues presented by the administrative record.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 91-2358 and 91-2514

ROSE ACRE FARMS, INC.,
Plaintiff-Appellee,
Cross-Appellant,

v.

EDWARD MADIGAN, Secretary of Agriculture, *et al.*,
Defendants-Appellants,
Cross-Appellees.

Appeals from the United States District Court
for the Southern District of Indiana, New Albany Division
No. NA 90-175-C—S. Hugh Dillin, *Judge*

ARGUED DECEMBER 6, 1991—DECIDED FEBRUARY 10, 1992

Before BAUER, *Chief Judge*, and EASTERBROOK and KANNE, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* The bacterium *Salmonella enteritidis* serotype *enteritidis* produces a violent illness, accompanied by fever, diarrhea, and vomiting, often requiring hospitalization. In the young, the old, and those weak for other reasons, salmonella can be fatal.

(For convenience we call both the bacterium and the disease "salmonella.") Milk and poultry products provide nutrients for the bacterium, and improperly handled food is its principal vector. An upsurge in reported instances of salmonella transmitted through food led federal officials to inquire why. One distressing possibility: a mutated form of the bacterium passes from chicken to egg before the shell forms, lying in wait to cause disease whenever the eggs are not cooked. As some persons use raw eggs to make hollandaise sauce and Caesar salads, and others do not store or cook eggs properly, the presence of bacteria poses a danger to public health. Hotels, nursing homes, and restaurants may use hundreds of eggs to produce batches of food. If even one egg contains salmonella, the batch will be contaminated; if the mixture sits at room temperature between steps in the preparation, the bacteria multiply rapidly.

The Department of Agriculture issued regulations that it believes will reduce the risk of salmonella transmitted in eggs. 56 Fed. Reg. 3730 (Jan. 30, 1991), to be codified at 9 C.F.R. §§ 82.30-82.38. (Amendments at 57 Fed. Reg. 776 (Jan. 9, 1992), do not affect our case.) After salmonella strikes, federal officials try to find the source of the food that the victims ate. When eggs are involved, the Department tests both the chickens and their surroundings for the bacterium. While the testing is underway—and afterward, if salmonella is found in either the birds or their environment—the producer may not sell eggs from that flock for consumption as table eggs. Until the flock has been certified salmonella-free, the owner may sell the birds for meat or may sell the eggs to "breakers" (firms that incorporate the eggs into other products, such as cake mixes, after pasteurization that eliminates all risk of salmonella), but may not sell whole eggs in cartons.

Under this approach risk to consumers falls close to zero. The producer pays for the consumers' gain. Whole table eggs fetch a higher price than eggs sold to breakers,

and layer hens are worth much more when producing eggs than when slaughtered. A ban on the sale of whole eggs can turn a profitable operation into a losing one—and the loss may be substantial when the producer is specialized to the production of table eggs, as Rose Acre Farms is. See *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1407-08 (7th Cir. 1989). Salmonella has been traced to three of Rose Acre's flocks, and the firm filed this suit under the Administrative Procedure Act seeking an end to interference with its sale of whole eggs.

Rose Acre advanced three principal challenges to the regulations: first that they are beyond the power of the Department of Agriculture because they protect consumers rather than animals; second that any belief that salmonella in chickens poses a risk to consumers (or that these regulations would alleviate the problem) is arbitrary; third that the Department's unwillingness to offer compensation for the loss created by the ban invalidates the rules. The district court rejected the first two lines of argument but accepted the third. 1991 U.S. Dist. LEXIS 8691 (S.D. Ind.). The court went on to hold that the testing provisions in one rule are independently invalid. The Department of Agriculture has appealed. So has Rose Acre—a puzzling step, as it won in the district court. A prevailing party is entitled to advance in support of its judgment all arguments it presented to the district court. It need not and should not file a cross-appeal just because the district judge rejected one of its arguments on the way to deciding in its favor. *Massachusetts Mutual Life Insurance Co. v. Ludwig*, 426 U.S. 479 (1976); *Jordan v. Duff and Phelps, Inc.*, 815 F.2d 429, 439 (7th Cir. 1987).

I

We start with the reason the district court gave for annulling the regulations—that Rose Acre is entitled to compensation. There are three potential sources of obligation to compensate: the takings clause of the fifth amend-

ment and two statutes, 21 U.S.C. §§ 114a and 134a(d). The Secretary of Agriculture believes that none of these requires compensation, not only because he has not ordered the destruction of any animal but also because the owners may make productive use of their birds by selling the eggs to breakers. To this Rose Acre replies that it is impossible to eliminate the bacterium from the environment without "depopulating" the chicken coops (a euphenism for killing the hens). Allowing famers to sell the eggs or hens diminishes the loss but does not remove the directive from the category of takings.

Although the Secretary draws a bright line between ordering the destruction of the birds and ordering their owners to take other actions that lead to loss, we suppose that even the Department of Agriculture would concede that giving the owner a choice between killing the birds and lofting them into orbit (in pressure suits, so they do not die) is the equivalent of an order to destroy the birds. An "alternative" that is less attractive financially than slaughter is the functional equivalent of a command to destroy the animals. And after *United States v. Causby*, 328 U.S. 256 (1946), it is hardly possible to say that only the transfer or physical destruction of property is a "taking." Airplanes flying low over a chicken farm caused some birds to die from fright; surviving birds laid fewer eggs. The diminution in the value of the farm was a "taking," the Court held. Perhaps an order justified by the need to prevent the spread of disease does not call for compensation under the Constitution, see *Miller v. Schoene*, 276 U.S. 272 (1928), but Rose Acre observes that § 134a requires payment even when the destruction is justified by contagion.

Before issuing the regulations, the Secretary concluded that neither the Constitution nor a statute requires compensation. The preamble to the regulations states that the Department "does not intend to authorize payments of claims for chickens voluntarily destroyed, to order man-

datory depopulation of infected chicken flocks and pay indemnities to the owners of destroyed chickens, or to make indemnity payments for eggs sold for pasteurization." 56 Fed. Reg. at 3731-32. The district judge thought otherwise. Holding that compensation is due under § 134a if not directly under the fifth amendment, the district court set aside the regulations themselves. No compensation, no regulation.

If either a statute or the Constitution requires compensation, one would suppose, the right way to proceed is to order payment, not to permit the sale of eggs that may kill people. What induced the district court to scratch out the regulations rather than to order payments is the Tucker Act's allocation of jurisdiction between district courts and the claims court. Only the claims court may award more than $10,000 against the United States on account of claims under the Constitution or statutes such as § 134a. Compare 28 U.S.C. § 1346(a)(2) with 28 U.S.C. § 1491(a)(1). Because the district court could not give Rose Acre the money to which that court believed it entitled, the court instead ordered the Secretary to cease the acts that gave rise to the need for compensation.

The Secretary contends that the district court lacks such power because the United States has not surrendered its immunity from suit, but this argument is unavailing. The APA allows judicial review of agency actions, and Congress has terminated sovereign immunity when the suit does not involve "money damages." 5 U.S.C. § 702. Rose Acre did not obtain money damages, did not even obtain an order that will lead to damages. Instead the judge issued an order that eliminates the need for damages. Such an order is within the court's subject-matter jurisdiction. See *Bowen v. Massachusetts*, 487 U.S. 879 (1988).

Jurisdiction to enjoin enforcement of the regulations is not the problem. Instead the difficulty lies in the

choice of remedy. If indeed the Constitution or a statute calls for compensation—a question on which we express no view—then setting aside the regulation is the wrong remedy. Compensation is the right one. The district court held the regulations invalid only because it could not award compensation. Yet Rose Acre's decision to file this suit in a court that cannot award the proper remedy hardly entitles it to some substitute and inappropriate remedy.

Rose Acre asked the district court to forbid acts that it believes "take" its eggs, and the court obliged. But the takings clause does not forbid takings; it requires compensation for takings. It reads: "nor shall private property be taken for public use, without just compensation." No one doubts that if these regulations "take" Rose Acre's property, the taking is for "public use". Cf. *Berman v. Parker*, 348 U.S. 26 (1954). If compensation is forthcoming, the Constitution allows the taking. The Tucker Act offers whatever compensation the Constitution requires. Rose Acre does not contend that the Tucker Act has been repealed by any of the agricultural statutes. Access to payment under the Tucker Act means that the taking may proceed. That *a district court* cannot order payment is irrelevant; the question is whether the United States will supply "just compensation." Through the claims court it will (if any is due), so there is no justification for interference with the taking. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-25 (1974); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984); *Preseault v. ICC*, 494 U.S. 1, 11-12 (1990).

Congress could of course create an entitlement to be free *of* takings in lieu of the constitutional requirement of compensation *for* takings. Rose Acre does not contend that any statute does this. The only statutes pertinent to the subject, 21 U.S.C. §§ 114a & 134a(d), are, like the fifth amendment itself, compensation rules rather

than obstacles to the taking. Section 134a(d) provides: "Except as provided in subsection (e) of this section, the Secretary shall compensate the owner of any animal, carcass, products, or article destroyed pursuant to the provisions of this section." Section 114a allows the Secretary to provide compensation in additional circumstances. Neither statute offers the slightest foundation for interdicting the order to destroy the animal or agricultural product.

As the district judge saw things, the warning that the Secretary "does not intend to authorize payments" is equivalent to forbidding payments. We do not read the language so. The Department has announced a litigating position. It believes that neither the fifth amendment nor a statute requires compensation, so it does not plan to pay. Someone who disagrees may repair to the claims court. If, as the district court believed, the Secretary is wrong, then the claims court will award compensation. If, however, the Secretary is right, then no compensation is due. Either way, it is inappropriate to halt the regulatory program. A court may not insist that the Department trumpet the producers' view of the law; capitulation is not a precondition to regulation. Even if this is wrong, and a preamble to a regulation has the force of law, the appropriate remedy is to excise the offending text, and the appropriate surgeon is the claims court.

Rose Acre submits that the claims court lacks "jurisdiction" to "invalidate" the "rule" barring compensation. True it is that the claims court lacks general equitable powers, *Richardson v. Morris*, 409 U.S. 464 (1973), although it may award some equitable relief ancillary to an award of money. 28 U.S.C. § 1491(a)(2), (3). See *Bowen v. Massachusetts*, 487 U.S. at 905-08. Yet whether the claims court can pluck the preamble from the page is no concern of Rose Acre's. Notwithstanding anything in the Federal Register, the claims court will implement

the Constitution and federal statutes. If Rose Acre gets just compensation, it has no further interest in the contents of musty journals. Almost the entire business of the claims court is awarding money over the opposition of the executive branch; that the executive announces an intention to oppose a given demand is no reason to think the claims court an inadequate forum.

Rose Acre must believe that the claims court will decide wrongly—that although compensation is due, the claims court and federal circuit will say that payment is unnecessary or will compute the compensation incorrectly. It should go without saying that the possibility of error by the right forum is no reason for a different forum to award an inappropriate remedy. The chance that the claims court will deny compensation even though money is due is no greater (and may well be less) than the risk that the district court will think compensation due even though it is not. It is to the claims court that Congress has entrusted the task of determining whether a statute or the Constitution requires compensation. It is to the claims court that Rose Acre must go.

II

The Secretary of Agriculture must "prepare such rules and regulations as he may deem necessary for the speedy and effectual suppression and extirpation of pleuropneumonia and other dangerous, contagious, infectious, and communicable diseases". 21 U.S.C. § 114. Sections 111, 114a, and 120 confer similar powers. That salmonella is dangerous and infectious is common ground. Rose Acre observes that salmonella is not dangerous *to the animals*; it is contagious among animals but does not injure them. According to Rose Acre, only diseases dangerous to animals fall within the jurisdiction of the Secretary of Agriculture. When the disease is dangerous exclusively to humans, Rose Acre insists, the Food and Drug Administration is the appropriate regulator. The

Secretary of Agriculture has neither statutory mandate nor expertise in dealing with human diseases, it submits. (Rose Acre assured us at oral argument that if the FDA had adopted the identical rules, it would not have argued that only the Department of Agriculture has a statutory mandate and expertise in dealing with farm animals. We are not comforted, but our suspicions are neither here nor there.)

The district judge rejected Rose Acre's contention, and properly so. As counsel for the Secretary cracked at oral argument, Title 21 is not animal rights legislation. (The principal means for dealing with diseases are quarantining or killing the animals, not comforting or curing them.) Control of illness among farm animals is for the welfare of humans: to protect our health from diseases animals carry, and to protect our wallets from the costs of sacrificing additional animals should the infection spread. Salmonella spreads from animals to people; it spreads among animals, potentially increasing the financial cost to farmers; and fear of salmonella depresses the demand for dairy and poultry products, again injuring agriculture. Nothing in the text of §§ 111, 114, 114a, or 120 confines the Secretary to addressing diseases fatal to animals.

Any ambiguity in these statutes is for the Secretary to resolve. Section 114 and similar provisions are express delegations of power to make rules. Delegation includes the power to interpret. Contrast *Pauley v. BethEnergy Mines, Inc.*, 111 S. Ct. 2524, 2534 (1991), with *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990). Congress called for the judgment of the Secretary, not the judgment of a court, on the appropriate response to diseases carried by animals. Nothing in these statutes forbids a judgment that danger to humans justifies regulation. Trichinosis may be harmless to pigs, but its suppression is within the Secretary's purview. So too with salmonella.

Rose Acre protests that the regulatory scheme is silly. Properly cooked eggs are safe. Bacteria in the eggs therefore are harmless, and it is absurd to expend large sums keeping harmless substances out of eggs. To this the Secretary replies: eggs are not always stored and cooked properly. Kitchen workers may spread salmonella to hundreds of persons by oversight. These negligent workers cannot compensate the victims; even their employers may lack sufficient assets. The costs of carelessness in the preparation of food can be reduced by more care elsewhere in the food chain, with net savings—or so the Secretary is entitled to conclude. Evidence may be adduced on both sides, but the administrative record supports the Secretary's conclusion that "scientific evidence suggests that SE [salmonella] is passed along to eggs before shell formation occurs if the hen is infected systemically with SE bacteria, and suggests vertical passage of SE from hens to chicks." 56 Fed. Reg. at 3730.

The district court reached the same conclusion independently after receiving evidence, which is not an appropriate procedure. Courts review administrative decisions on administrative records; if the record or explanation is inadequate, the court should remand the proceedings rather than make its own decision. *Cronin v. Department of Agriculture*, 919 F.2d 439, 444 (7th Cir. 1990) ("only in an emergency should a reviewing court . . . conduct its own evidentiary hearing."). Informal rulemaking under the APA creates both a record and an explanation; the district court should have limited its attention to these. It is the Secretary's assessment of the data, not a judge's, that the statute makes controlling. We accept the Secretary's judgment on the Secretary's record. Cf. *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 796-97 (1978).

Even if the Secretary is entitled to curtail the volume of salmonella in eggs, Rose Acre submits, he is not entitled to do this in an irrational way. These regulations are irrational for two reasons, Rose Acre tells us: first,

it would be cheaper to test the eggs for bacteria than to eliminate shipments from whole flocks; second, it is whimsical to limit testing and quarantine to flocks identified by tracing back from outbreaks of salmonella. Neither of these possibilities need detain us.

Testing for salmonella is expensive and difficult. See *General Foods Corp. v. Valley Lea Dairies, Inc.*, 771 F.2d 1093 (7th Cir. 1985). Testing destroys the eggs; testing even a large sample of eggs from a given flock will not be sufficient if the objective is to assure a very low probability of salmonella in any shipment. The lower the acceptable rate of infection, the greater the proportion of eggs that must be tested. Rose Acre has not suggested a testing regimen that both achieves the Secretary's objective and costs less than the current regulations.

As for tracing: the Secretary is entitled to conclude that working backwards from an outbreak identifies the flocks that pose the greatest risk to humans. Selectivity is the essence of judgment. If grandfather clauses are legitimate, see *FCC v. NCCB*, 436 U.S. at 802-09, tracing rules are not troubling. Of course the match is not perfect. Maybe 1% of all eggs are infected, and tracing catches only luckless suppliers whose eggs fell into the hands of careless food preparers. But if this is so, tracing is equivalent to random testing. Often the best way to enforce a rule is by spot checks—testing, say, one of every hundred flocks each year and acting sternly when the test reveals salmonella. A farmer selected randomly for testing could not protest that the Secretary should have tested 2% or 10% of all flocks rather than 1%. Cf. *FTC v. Universal-Rundle Corp.*, 387 U.S. 244 (1967); *Moog Industries, Inc. v. FTC*, 355 U.S. 411 (1958). If the Secretary is right, tracing helps find and deal with the most dangerous sources of salmonella at the least cost; if Rose Acre is right, tracing is the equivalent of random checks; either way, tracing is a lawful strategy.

III

Although the district court concluded that the rules as a whole are within the Secretary's power (questions about compensation to one side), it held 9 C.F.R. § 82.38, 56 Fed. Reg. at 3742-43, invalid as arbitrary.

Once an outbreak of salmonella has been traced to a source, the flock is tested and, if *any* test is positive, sales are restricted. If however the producer can show that it maintains "biosecurity" between poultry houses, only the birds in coops where salmonella has been found are deemed infected; the producer can freely sell the eggs from other layers. "Biosecurity means that flock management procedures are in place to ensure that there is no contact between poultry houses through exposure to chickens, feed, water, manure, equipment, or personnel from other poultry houses." 9 C.F.R. § 82.30 (definition of "separate poultry house"), 56 Fed. Reg. at 3739. Section 82.38(b) then provides that if any poultry house on a farm is infected, "[a]ll other poultry houses . . . shall undergo monitoring tests . . . until 120 days after the date infected house status is removed from all poultry houses on the premises." Monitoring means that a federal or state employee "shall collect manure and egg transport machinery samples from each house . . . at intervals of not less than 45 days and not more than 60 days." Any house from which a sample is positive for salmonella is designated a "test house," with shipments restricted until further testing shows it free from salmonella or the house has been "depopulated" and disinfected.

It is this repetitious testing on farms containing one or more infected poultry houses that the district court deemed arbitrary. Given "biosecurity," the court thought, there is no reason to believe that a poultry house is at special risk just because some other house on the farm is infected, and therefore no reason for special testing. Grant the premise, and there is also no *less* reason to

suppose that such a house is infected than is any randomly selected house at a randomly selected farm. Random testing is appropriate—indeed, Rose Acre wants the Secretary to do less tracing and more comprehensive or at least random testing—so testing of houses in this fashion also would be appropriate.

What is more, the Secretary does not grant the premise. "Biosecurity" under these regulations is not all-or-nothing. It is not as if a "separate poultry house" is inside a pressurized bubble, with food, water, air, clothing and the farm workers contained therein sterilized as they enter. Not even biological laboratories achieve such isolation. It brings a bit of mirth to our grey profession to compare a poultry farm with a center for research into recombinant DNA or a plant where vaccine is manufactured—places where greater efforts in the direction of biosecurity cost hundreds of dollars per pound of product. Farms are biologically leaky. Salmonella from the infected house may spread to nearby houses despite the best efforts. Testing to find out whether this has happened is a precaution. It may be that the probability of spreading does not justify the costs, but such arguments are for the Secretary and not the court. We repeat, it is the Secretary's view of the costs and benefits of regulation that Congress has made controlling.

Many thoughtful persons believe that the Code of Federal Regulations overflows with unjustified, even perverse, rules; every thoughtful person believes that some of the rules are unjustified. Under the APA, the judicial task is limited to pruning the outliers. If the administrative record does not reveal a compelling need to adopt these regulations in the form the Secretary chose, it assuredly does not reveal that the regulations are muddle-headed meddlesomeness. How far, and how, to regulate poultry production to curb the risk of salmonella are

economic, social, and political rather than legal questions. How far compensation may be necessary is a legal question, but one for another court.

REVERSED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

No. NA 90-175-C

ROSE ACRE FARMS, INC.,
Plaintiff,

-vs-

EDWARD MADIGAN, Secretary of Agriculture of the United States, JAMES W. GLOSSER, Administrator, Animal and Plant Health Inspection Service of the United States Department of Agriculture, and the UNITED STATES DEPARTMENT OF AGRICULTURE,
Defendants.

MEMORANDUM OF DECISION

Plaintiff Rose Acre Farms (Rose Acre) seeks a declaratory judgment that certain regulations promulgated by the United States Department of Agriculture are invalid. The defendant filed two motions to dismiss, which are hereby denied.

A hearing was held on April 26, 1991 at which time the plaintiff and the defendants presented evidence. Pursuant to Rule 65(a)(2), F.R.Civ.P., and plaintiff's motion to consolidate the trial on the merits with the hearing on the preliminary injunction, the Court finds that no further evidence is necessary to resolve the claims before it; therefore the trial of the action on the merits is considered to be advanced and consolidated with the hearing. The Court now makes the following findings of fact and conclusions of law in the form of this memorandum of decision. Rule 52(a), F.R.Civ.P.

Background

On February 16, 1990, defendants United States Department of Agriculture (USDA), the Secretary of Agri-

culture, and the Administrator of the Animal and Plant Health Inspection Service (APHIS) of USDA, promulgated interim regulations purportedly to control the spread of *salmonella enteritidis* serotype *enteritidis* (SE). 55 Fed. Reg. 5576, 9 C.F.R. §§ 82.30-82.36 (1990) (Interim SE Regulation). USDA made the Interim SE Regulation effective on February 16, 1990, the date on which it was first published in the *Federal Register*. The Interim SE Regulation set up a procedure which, *inter alia*, restricted interstate movement of table eggs from certain designated poultry flocks. On January 30, 1991, USDA published a final SE regulation (Final SE Regulation), which purports to replace the Interim SE Regulation. 56 Fed. Reg. 3730, 9 C.F.R. §§ 82.30-82.38 (1991). (The Interim SE Regulation and the Final SE Regulation are referred to collectively as the SE Regulations). The Final SE Regulation makes certain modifications and additions to the Interim Regulation.

Plaintiff Rose Acre Farms (Rose Acre) is in the business of producing poultry table eggs for sale, and owns and operates several egg-producing farms. It is, according to its complaint, the second largest egg producer in the United States. Three of its farms were tied to SE outbreaks in humans. After testing under the Interim SE Regulation, restrictions were imposed at two of its facilities.

On December 28, 1990, Rose Acre filed its complaint in this action seeking a declaratory judgment that the Interim Regulation was invalid in that it (1) deprived Rose Acre of due process, (2) was not promulgated in accordance with the Administrative Procedure Act (APA), 5 U.S.C. § 5511 *et seq.*, (3) exceeded USDA's statutory authority, and (4) violated Rose Acre's right to equal protection under the Fifth Amendment to the Constitution of the United States. On February 18, 1991, Rose Acre filed its First Amended Complaint seeking a declaratory judgment that the Interim or the Final Regulations are

invalid on the basis that (1) they deprive Rose Acre of due process, (2) the Interim Regulation was not promulgated in accordance with the APA, (3) both regulations exceed USDA's statutory authority, (4) the Final Regulation may not be applied retroactively, and (5) the regulations unlawfully delegate authority to state officials. Rose Acre has now amended its First Amended Complaint adding two new counts. In Count VII, plaintiff claims that application of certain monitoring provisions is invalid, and in Count VIII, plaintiff claims that it is entitled to compensation for eggs diverted to pasteurization facilities, hard boiling or export under the SE Regulations.

Discussion

SE Regulations

The SE Regulations set out a system of testing and monitoring poultry chicken flocks for SE, and for restricting eggs and other articles deemed infected or at high risk for infection. There are three levels of testing which may be applied to a poultry flock.

First level An egg production flock is determined to be a "study flock" when it has been "implicated as the probable source of disease in an outbreak of disease in humans or poultry caused by [SE]," or when the flock has received progeny from a breeding flock that has had SE recovered from the internal organs of one or more chickens through testing in accordance with other sections of the regulations. 56 Fed. Reg. 3740 (9 C.F.R. § 82.32(a)). No restrictions are placed on study flocks unless the person in control of the flock refuses to permit further testing, in which case the flock automatically becomes a "test flock." 56 Fed. Reg. 3740 (9 C.F.R. § 82.32(b)(1)).

Second level. After a flock has been classified a "study flock, tests are conducted upon samples from manure and upon egg transport machinery to determine the existence of SE in the "environment." *Id.* at 3740 (§ 82.32(b)).

If the flock does not contain separate houses as defined in § 82.30, then the entire flock is deemed a test flock. Separate houses are those deemed to have biosecurity to prevent the transmission of communicable disease to other poultry houses. (§ 82.30). Eggs from a test house or test flock may not be shipped in interstate commerce as table eggs, but may be shipped interstate to pasteurization facilities (also known as "breakers"), for hard boiling at an egg products plant, or for export [1] from the United States. *Id.* at 3741 (§ 82.33(a)).

Third level. After classification as a test flock or house, blood and internal organ samples are collected and tested. *Id.* at 3740-41 (§ 82.32(c)). If the samples test positive for SE, the flock or house is deemed to be "infected." *Id.* If the samples test negative, then the house or flock is retested. *Id.* If the test results are negative again, the flock is determined not to be a study, test or infected flock. Eggs from an infected house or flock are restricted in the same manner as those from a test house or flock. *Id.* at 3741 § 82.33(a)).

An infected house is released from infected status when it is depopulated and cleaned to USDA satisfaction or when the house twice tests negative for blood and internal organ samples. (§ 82.32(e)).

In addition to the sampling and testing provision, the Final Regulation contains monitoring provisions which Rose Acre argues have been improperly retroactively applied against it.

Application to Rose Acre

Rose Acre owns and operates three facilities at which the SE Regulations have been applied.

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[1] The Court finds it extremely disturbing that eggs which are deemed unfit for sale as table eggs in our domestic market are considered suitable for export to other countries.

Cort Acres

After a wedding reception held in Kentucky on August 11, 1990, several of the guests reportedly became ill from SE. The Kentucky Department for Health Services (Kentucky Health Department) concluded that the sickness had probably been caused by eating hollandaise sauce containing eggs, and that the eggs had come from the Cort Acres Farm, a Rose Acre facility located near Cortland, Indiana. Based, at least in part, on the Kentucky Health Department's report, USDA designated the Cort Acres facility a "study flock" under the Interim SE Regulation on September 13, 1990. USDA took environmental samples, and later, blood and tissue samples. Nine houses were eventually designated infected.

White County Farm

A second SE outbreak occurred at the Hyatt Regency Hotel in Chicago on September 30, 1990. The Chicago Department of Health and the Illinois Department of Public Health (collectively, the Illinois Health Department) jointly investigated the Hyatt outbreak. The Illinois Health Department issued a report in which it concluded that eggs used in a bread pudding with vanilla sauce desserts were the probable source of the SE outbreak, and that the eggs came from the flock at Rose Acre's White County Farm, in White County, Indiana. Based, at least in part, on the Illinois Health Department's report, USDA designated the White County farm a "study flock."

USDA conducted environmental tests on a group of houses known as the second quartile, and then on the first quartile. Based on these tests, USDA declared both quartiles "test flocks" under the SE Interim Regulations. On January 25, 1991, USDA commenced blood and tissue testing on both quartiles. On February 8, 1991, USDA designated the first and second quartiles at the White County farm an "infected flock." Subsequently, USDA

determined that adequate biosecurity existed between the infected and non-infected houses at the White County farm and certain noninfected houses were released from "infected flock" status.

Jen Acres

On or about October 25, 1990, two families in Tennessee reportedly became ill after eating a banana pudding dessert. The Tennessee Health Authority issued a report in which it concluded that eggs containing SE were the likely cause of the illnesses and that the eggs came from the Jen Acres facility in Jennings County, Indiana. Based, at least in part, on Tennessee Health Authority's report, USDA designated the Jen Acres facility a "study flock" under the Interim SE Regulation. USDA collected and tested environmental samples from Jen Acres. Based on the environmental test results, USDA designated the Jen Acres flock a "test flock." USDA then conducted blood and tissue tests and based on the test results designated the entire flock and [sic] "infected flock" on February 6, 1991. Restrictions were placed on the interstate movement of all Jen Acres eggs. On February 7, 1991, USDA advised Rose Acre that it would release one house from infected flock status on the basis of negative environmental sampling and improved biosecurity.

Rose Acre claims that it is harmed in many ways by the application of the SE Regulations. It asserts that classification of a flock as a study flock causes a loss of reputation and goodwill. Rose Acre further claims that the "test" and "infected" classifications causes harm in that Rose Acre is forced to sell eggs for pasteurization or hard boiling. The prices received for eggs sold into those markets are far below the prices that prevail for shell eggs. Rose Acre has already had to sell millions of eggs to pasteurizers (or "breakers") at average prices that are below Rose Acre's cost for the eggs. There is also apparently a tendency for many breakers not to buy restricted

eggs as certain food retailers will not accept the liquid eggs made from restricted eggs. Rose Acres claims losses of over $50,000 per day from the restrictions which have been imposed.

Rose Acre also alleges harm in that it has spent substantial sums to clean, disinfect, and establish adequate biosecurity among the houses.

Scope of Review

The scope of review of an agency's informal rulemaking is set forth in 5 U.S.C. § 706, which provides in pertinent part:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> * * *
>
> (2) hold unlawful and set aside agency action, findings and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege or immunity;
>
> (C) in excess of statutory jurisdiction, authority or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> * * *

The scope of review of agency regulations under the arbitrary and capricious standard is narrow, and a court is not to substitute its own judgment for that of the agency. *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S.

29, 43, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443, 458 (1983). Even under this standard, the court is required to engage in a "thorough, probing, in-depth review." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415, 91 S.Ct. 814, 823, 28 L.Ed.2d 136, 153 (1971).

A preliminary concern in this case is what evidence the Court should consider in reviewing these Regulations. In a motion *in limine* defendants asked the Court not to consider evidence beyond the administrative record. The administrative record here is comprised of the Interim and Final Regulations, along with the agency explanation and comments thereto, and the letters submitted to the agency during the comment period after promulgation of the Interim Regulation. At the trial, Rose Acre offered extra-record evidence including deposition testimony of various USDA officials, and live testimony from Dr. Lawrence T. Glickman, Professor of Epidemiology and Environmental Medicine at Purdue University. The defendants introduced testimony from Dr. John Mason, Director of the Salmonella Task Force of APHIS.

The United States Supreme Court has stated that generally "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743, 105 S.Ct. 1598, 1607, 84 L.Ed.2d 643, 656 (1985). However, courts have carved out broad exceptions to this general principle that "are now so far reaching that they can be applied in almost any case." Stark and Wald, *Setting No Records: The Failed Attempt to Limit the Record on Review of a Judicial Administrative Action*, 36 Admin. L. Rev. 333, 343 (1984). Such exceptions include: (1) when an agency action is not adequately explained in the record before the court, *see Overton Park*, 401 U.S. at 420, 91 S.Ct. at 825, 28 L.Ed.2d at 155; (2) when the agency ignored relevant factors it should have considered in making its decision, *see Hiatt Grain & Feed, Inc. v.*

Bergland, 446 F.Supp. 457, 467 (D.Kan. 1978), *aff'd on other grounds*, 602 F.2d 929 (10th Cir. 1979), *cert. denied*, 444 U.S. 1073, 100 S.Ct. 1019, 62 L.Ed.2d 755 (1980); *Asarco, Inc. v. EPA*, 616 F.2d 1153 (9th Cir. 1980); (3) when the agency considered factors that were left out of the formal record, *see Environmental Defense Fund Inc. v. Blum*, 458 F.Supp. 650, 661 (D.D.C. 1978); (4) when the case is so complex and the record so unclear that the reviewing court needs more evidence to enable it to understand the issues, *see Bunker Hill Co. v. EPA*, 572 F.2d 1286, 1292 (9th Cir. 1977); and (5) when evidence arising after the agency acted demonstrates that the actions were right or wrong, *see American Petroleum Institute v. EPA*, 540 F.2d 1023, 1034 (10th Cir. 1976), *cert. denied*, 430 U.S. 922, 97 S.Ct. 1340, 51 L.Ed.2d 601 (1977).

The Court finds that the above exceptions apply to the instant case. The agency record contained over 300 pages of comments from poultry trade associations, flock owners, state animal and public health agencies, universities and others as well as the SE Regulations themselves and the agency's own explanation and comments. However, none of this information sufficiently explains the scientific basis of the SE Regulations or the scientific and public and animal health consequences of promulgating and enforcing the SE Regulations. The extra-record testimony submitted in this case helps to explain the basis, or lack thereof, and helps illuminate technical issues. For these reasons, the Court declined to exclude the evidence and declines not to omit it from its review of the agency action.

1. USDA Authority to promulgate the SE Regulations; Rational Basis of the Regulations

Rose Acre argues that USDA did not have the authority to promulgate the SE Regulations, and that even if USDA had such authority, the Regulations are invalid because

they are arbitrary and capricious. The argument that USDA has authority over animal health matters and not human health matters, and that the Regulations are not rationally related to animal health, is common to both claims.

USDA contends that its authority to promulgate the Regulations derives from Title 21 U.S.C. § 111, which statute provides in relevant part:

> The Secretary of Agriculture shall have authority to make such regulations and take such measures as he may deem proper to prevent the introduction or dissemination of the contagion of any contagious, infectious, or communicable disease of animals and/or live poultry from a foreign country into the United States or from one State or Territory of the United States or the District of Columbia to another . . . and to seize, quarantine, and dispose of any . . . animal products coming from one State or Territory or the District of Columbia in transit to another . . . whenever in his judgment such action is advisable in order to guard against the introduction of such contagion.

Rose Acre argues that the SE Regulations are not rationally related to the prevention of the spread of disease among animals and therefore are in excess of USDA's statutory mission, which is to prevent the spread of disease among animals. We agree with the defendants that, looking at the regulatory scheme as a whole, the regulations do bear a rational relationship to their purpose and do not exceed the scope of the agency's authority.

The main argument that emerges from Rose Acres several briefs treating this issue is that the SE Regulations are primarily devoted to controlling the spread of SE among humans, and that the proper agency to address control of diseases among humans in the Food and Drug Administration (FDA). Secondary to this contention is the claim that the SE Regulations will not promote either animal or human health.

At the trial Dr. John Mason, director of USDA's Task Force on Salmonella, testified regarding the evolution of the regulations, and on why they were finally promulgated by the FDA and USDA. It is apparent from his testimony that various political pressures were at work, and that both agencies were concerned with meeting quickly what was considered an urgent need. One reason why the USDA eventually got the project was that the USDA was in the business of dealing with the animal industry. As Dr. Mason said, USDA "had authority to work on farms with poultry and animals and had the experience."

It is no secret that underlying the USDA's authority to control the spread of contagious disease among animals is a concern for human health. The fact that the regulations appear to be geared ultimately to human health, and to reducing the occurrence of SE among humans, does not of itself negate their stated goal of reducing the spread of SE among poultry. The Court concludes that due to the broad public health concerns contemplated by 21 U.S.C. § 111, and due to USDA's authority to work with farms, the defendants did not act in excess of their authority in promulgating the SE Regulations.

Rose Acre contends that even if the defendants had authority to promulgate the SE Regulations, the regulations are invalid since they are arbitrary and capricious.

Rose Acre argues that the SE Regulations are not rationally related to protecting either human or animal health in that they have no scientific basis. It argues that the regulations are flawed in that 1) USDA has no baseline data to show the prevalence of SE in egg-type chickens or in the eggs that they lay, and thus has no way to assess the success or failure of the restrictive measures; and 2) that the SE Regulations focus on the egg producers rather than on the food handlers, and are therefore not scientifically directed to eliminate or reduce the risk of SE infection.

As for the second alleged flaw, there is no dispute among the parties or among the commenters (as the Final Regulation refers to those who submitted comments) to the SE Interim Regulation that an outbreak of SE may result from improper food handling. If eggs are not cooked for the sufficient amount of time at the proper temperature or if undercooked or raw eggs are part of a dish which is allowed to remain unrefrigerated for some time, salmonella organisms present in the eggs will multiply, increasing the risk of illness to humans. It is acknowledged even among supporters of the Interim Regulation that individual consumers as well as food handlers for restaurants, catering services, and similar operations should be better educated regarding the dangers of improperly handled eggs. However, this does not mean that additional measures, such as restrictions on eggs produced by flocks implicated in an outbreak, are not rationally related to reducing the spread of SE.

The first alleged flaw presents the real difficulty in this case. Whether the Regulations lack scientific underpinnings is not fully answered by the regulations, by the preamble to the regulations, or by the comments to the Interim SE Regulations, but was addressed at trial and in deposition testimony submitted as exhibits during the trial.

Dr. Lawrence Glickman, an epidemiologist and a professor at Purdue University, stated his opinion that the Regulations lack scientific basis.[2] Specifically, he stated that at the time that the SE regulations were promulgated, the USDA lacked information regarding the prevalence of SE in layer flocks, and that the regulations were promulgated on the assumption that SE is an alarming

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[2] Dr. Glickman criticized many features of the regulations. We are most concerned here with those criticisms which could cast doubt on the rational relationship of the regulations to their goal of controlling the spread of SE, and therefore summarize only the most pertinent portions of his testimony.

problem requiring immediate action. If one does not know the baseline prevalance in the flocks, he said, then the traceback information is impossible to interpret. He suggested that there is very little data to support the proposition that SE among humans is a major public health concern. His opinion was that diversion of eggs away from the commercial table egg market would not have any impact on animal health, and that the tracebacks, the serologic testing, and the disinfection procedures outlined in the regulations are unproven methods of controlling SE. He also stated that SE is not a serious poultry problem.

All of these concerns are relevant to the USDA's decision to promulgate regulations addressing SE; however, we do not think that Dr. Glickman's testimony negates a rational basis for the regulations as promulgated.

Unfortunately, the administrative record is less than helpful. The preamble to the Interim SE Regulations states that "SE is a serious poultry disease and public health concern that shows no sign of abatement, but instead appears to be increasing." 55 Fed. Reg. 5576 (February 16, 1990). The section justifying "emergency action" in the Interim Regulations states that "SE is a present and expanding cause of economic concern for the United States egg-type chicken industry, and has also recently emerged as a serious public health concern. Immediate action is necessary to prevent harm to the egg-type chicken industry and the public." *Id.* at 5580.[3] The Final SE Regulation describes SE infection of egg

[3] The plaintiff claims that promulgation of the SE Interim Regulations without allowing for a proper notice and comment period violated the APA, 5 U.S.C. § 553. Dr. John Mason's testimony supports the proposition that there was an agency determination, supported by at least some evidence, of a situation of urgency calling for emergency agency action. For this reason, the Court declines to rule that the SE Interim Regulation was invalidly promulgated without the proper notice and comment procedures, but concludes that the agency had good cause to make the rules immediately effective under the Administrative Procedure Act § 553(b)(B).

production chickens as "a serious public health concern," and observes that "SE has a severe impact on the egg production industry by reducing consumer demand and disrupting egg marketing channels."

In support of its motion to dismiss, the defendants relied on such statements to demonstrate that the regulations were rationally related to animal health, and were not arbitrary and capricious. We do not believe that language contained in the preambles to the SE Regulations in themselves constitute evidence that such a problem exists. Nor is the administrative record very helpful on this issue; many of the commenters endorsed the effort to control SE, but many of them also indicated that more studies need to be done. Certain of the commentators who do endorse USDA's intention to control what is perceived as a growing problem merely object that the USDA's efforts are not directed toward education, but only toward testing poultry and restricting the movement of certain articles in the interstate market.

Dr. Mason testified as to USDA's scientific bases for promulgating the Regulations. He testified that before the promulgation of the Interim SE Regulation, there had been a sharp outbreak of a type of SE known as phage type four in Europe, followed by an increase in SE phage type eight in the Northeastern United States. According to Dr. Mason, after a report was issued by the Center For Disease control in Georgia, the poultry industry, the FDA, and the USDA were all concerned about the possibility that there was a rising incidence of outbreaks in this country, and that SE outbreaks implicating table eggs might be spreading in this country. The promulgation of the SE Regulations was an effort to reduce the risk of vertical and horizontal spread of SE among poultry.

As for the lack of baseline information regarding the prevalence of SE in poultry flocks in the United States, Dr. Mason testified that the USDA did not have such information at the time of promulgating the rules, nor

did the agency have it at the time of the trial, although at the time of the trial, the USDA had begun two studies which would yield information on the prevalence of SE in poultry. Meanwhile, he stated, prevalence is inferred from data regarding outbreaks in humans, which data, according to Dr. Mason, is the most reliable information we have at present.

Dr. Mason testified that the USDA now acknowledges that SE is "not a serious problem" for poultry, but takes the position that, as indicated in the Final SE Regulation, SE among poultry may lead to illness in humans. He also stated that pasteurization of eggs is likely to produce only slight benefits for animal health: clearly, the main purpose of the pasteurization process is to prevent illness in humans. He also indicated, as do the Final Regulations, that the risk of poultry mortality due to SE among the flocks is low. The economic concern is that poultry producers will receive negative publicity if they are implicated in an SE outbreak among humans. The agency position is that reducing the risk of such outbreaks among humans will benefit the industry as a whole as it will reduce the chances for negative publicity.

We do not believe that the regulations—either the Interim SE Regulations or the Final SE Regulations—should be invalidated as arbitrary and capricious merely because the benefit to animal health is "slight" while the real purpose of the rule is to benefit human health. Nor do we believe that scientific underpinning is entirely lacking for the SE Regulations, based on Dr. Mason's testimony. While there is clearly a call for additional studies, the information available to the USDA when it promulgated the Regulations appeared to indicate that SE threatened to spread both vertically and horizontally, and that the risk of spread could be addressed by the procedures that the agency sought to impose. For this reason, the Court concludes that the SE Regulations are not arbitrary and capricious.

Due Process

Rose Acre also argues that the SE Regulations violate the due process clause of the Fifth Amendment to the United States Constitution in that they fail "to afford a right to an administrative hearing or review."

The first question under due process analysis is whether the plaintiff has a liberty or property interest. *Gaballah v. Johnson*, 629 F.2d 1191, 1202 (7th Cir. 1980). We agree with the plaintiff that it has a property interest in its eggs and chickens, which interest is affected by the regulations. First, under the regulations, the eggs themselves may be restricted from interstate movement. Thus, the defendants' argument that this does not amount to a deprivation of property must fail. It is true that the eggs themselves are not confiscated or destroyed when the restriction is imposed; however, diversion to the allowed markets results in a deprivation of property, since the producer is forced to sell the eggs at a price below cost. Moreover, Rose Acre has a property interest in its egg-producing hens. Rose Acre stands to lose some of them through the testing process, others through depopulation, and the value of others through the fact that the eggs they produce are restricted.

As to the satisfaction of due process, the United States Supreme Court has identified three factors which courts should consider:

> (1) the private interest that will be affected by the official action;
>
> (2) the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally,
>
> (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

See Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18, 33 (1976).

The Court agrees with Rose Acre that its potential private interest is great; Rose Acre complains that it is losing over $50,000 per day. We also agree with the defendants that the USDA and APHIS in particular have a strong interest in reducing the risk of the spread and occurrence of SE. We believe, however, that based on the regulations themselves, the administrative record, and the testimony and exhibits submitted at trial, the plaintiff has not demonstrated a significant risk of *erroneous* deprivation, or that there would be significant value in additional procedures, such as an administrative hearing proceeding the imposition of restrictions.

First, the regulations themselves mandate testing and retesting to determine whether an egg production flock or house is infected with SE. The testing process itself provides a safeguard that restrictions will not apply to eggs produced by a poultry house which is not identified as a test or infected house. Second, as the defendants point out, "the opportunity for a hearing may be denied if inspection, examination or testing is a better way to find the facts." 2 K. Davis, *Administrative Law Treatise*, § 12:12, at 455 (2d ed. 1979).[4] Here, epidemiologic investigation by trained officials, followed by laboratory testing and resting, is apt to be more effective than holding administrative hearings to determine the likely source of an outbreak of SE in humans. Third, we think that administrative hearings would pose a significant burden to the government.

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[4] *See, e.g., Door v. Donaldson*, 195 F.2d 764, 766 (D.C.Cir. 1952) ("[The Administrative Procedure Act] exempts from the requirements of a full hearing, because they 'rest solely on inspections,' only decisions that turn either upon physical facts as to which there is little room for difference of opinion, or else upon technical facts like the quality of tea or the conditions of airplanes, as to which administrative hearings have long been thought unnecessary.")

3. Delegation of Authority

The plaintiff claims that the SE Regulations unlawfully delegate authority to state officials. This claim is unfounded since no real delegation of authority has taken place. Under the regulations, the Administrator of APHIS has the authority to determine that a flock has been implicated as the probable source of disease in humans after determining that "[e]pidemiologic reports from Federal or State health agencies identify the cause of the outbreak as [SE]." 9 C.F.R. § 82.32(a)(1). The Administrator is in the position of authority and responsibility; reliance on reports from state and local officials does not constitute delegation.

4. Monitoring under Section 82.38

On February 6, 1991, USDA advised Rose Acre that it intended to conduct monitoring tests, pursuant to Section 82.38 of the Final SE Regulations, on certain houses at Cort Acres and Jen Acres that had previously been released from "test flock" or "infected flock" status. Rose Acre refused to permit USDA to conduct these monitoring tests. On April 16, 1991, USDA advised Rose Acre that if Rose Acre did not permit such monitoring tests, USDA would declare those houses formerly released from "test flock" and "infected flock" status to be test houses under the Final SE Regulations.

Rose Acre claims that USDA lacks authority to monitor released houses that Rose Acre has already cleaned and disinfected pursuant to the SE Regulations. It therefore claims that the monitoring provision, in particular, section 82.38(b), is invalid. The Court finds the entire monitoring provision invalid.

Plaintiff's claim raises two issues. First, we consider whether the language of the monitoring provision applies to cleaned and disinfected houses. Concluding that it does apply,

The parties' basic dispute on this claim involves the interpretation of § 82.38. Subsections (a) and (b) of that section provide the following:

> (a) This paragraph applies to any poultry house that is in test poultry house status at any time when any other poultry house on the same premises is in infected poultry house status. If any such test poultry house is released from test poultry house status in accordance with § 82.38(b)(2) of this subpart, the poultry in the former test poultry house will be tested a third time with the blood and internal organ tests required by § 82.38(c) and (d) of this subpart, within 45 to 60 days following the date the house was released from test house status. If this blood and internal organ monitoring test has positive results, the poultry house will be determined to be an infected poultry house in accordance with § 82.32(c) and (d) of this subpart.
>
> (b) *All other* poultry houses on a premises containing an infected poultry house, except any test poultry house, shall undergo monitoring tests as follows from the date the flock owner is notified of the determination of an infected house until 120 days after the date infected house status is removed from all poultry houses on the premises. A Federal representative or State representative shall collect manure and egg transport machinery samples from each house in accordance with § 82.32(b) of this subpart, at intervals of not less than 45 days and not more than 60 days. If the samples from any house test positive in accordance with § 82.32(d) of this subpart, that house shall be determined to be a test poultry house in accordance with § 82.32(b) of this subpart.

Subsection (c) requires that a third set of blood and internal organ tests be conducted on houses which had been released from infected poultry house status. Rose Acre contests the monitoring provision as applied to those

houses which had been previously released from either test or infected status by being cleaned and disinfected.

USDA contends that the phrase "all other" in subsection (b) refers to *all* houses that are not classified as "infected" or "test" houses. Rose Acre contends that subsection (b) of the monitoring provision is limited to houses that never tested positive in the environment. It argues that houses which previously tested positive for SE in the environment but were cleaned and disinfected are not subject to monitoring under subsection (c). Rose Acre argues further that the defendants' reading, which would subject cleaned and disinfected houses to monitoring, is at odds with USDA's assertions that test and infected houses which are completely released as a result of three negative blood and tissue tests, are not subject to further monitoring. It argues that the phrase "all other" refers to houses already falling under subsection (a).

USDA's interpretation of the phrase "all other houses" makes the most sense. First of all, section 82.38(b) uses plain language. We believe that "all" means "all." In other words, monitoring will apply to houses which previously tested negative in the environment, as well as to the cleaned and disinfected houses which are, like the non-status houses, not classified as test or infected houses. There is nothing in the monitoring provision itself which would favor a non-inclusive reading of the term "all," nor is the plain reading at odds with the regulatory scheme read as a whole.

Second, we reject the plaintiff's reliance on the statement of basis and purpose contained in the preamble to the rule. The plaintiff points to the following three sentences contained at 56 Fed. Reg. 3730, 3736 (January 30, 1991):

> All other poultry houses (*i.e.*, houses that tested negative to environmental manure and egg transport

> machinery samples) on a premises containing an Infected Poultry House shall undergo monitoring tests as follows.
>
> * * *
>
> Samples from other than former test houses will be collected approximately every 45 days from each house on the premises with the Infected Poultry House for as long as that infected house remains there, and for 120 days afterward.
>
> * * *
>
> From the date there is no longer an Infected Poultry House on the premises, all houses that never had positive environmental samples continue with environmental monitoring for 120 days.

We think that these sentences do not support the plaintiff's position on interpretation since, 1) they merely show that cleaned and disinfected houses were not specifically considered in the preamble (and thus were not considered to raise different concerns from the non-status houses), and 2) even if they are considered ambiguous as to the monitoring provision's application to cleaned and disinfected houses, they do not override the plain language of the rule. Moreover, language in the Final Regulation's statement of basis and purpose supports the defendants' position:

> The fact that there is an Infected Poultry House changes the situation for all other houses on the premises; although past tests show them to be non-infected, they must be monitored closely because of the proximity of an Infected Poultry House. (While we consider each separate poultry house to have effective barriers to the spread of disease between houses through the prohibition on common poultry, feed, water, equipment, and personnel, there is a slight risk of spread of SE through sources than can not practically be controlled, such as flies, rodents, or

wild animals. This is the risk these monitoring tests address.)

It is clear that the intended purpose of the monitoring provision is to reduce the risk that SE will spread from an infected house to *any* other house on the premises which is not contaminated. We see no reason to believe that houses which have been cleaned and disinfected are at any less risk of being contaminated by SE-carrying flies, rodents, or wild animals than are houses which originally tested negative in the environment.

The dispositive problem with this provision is whether it bears a rational relationship to the control of SE. The agency has already determined that for purposes of the initial testing, where there is adequate biosecurity between houses on the premises, the houses will be considered separate units for testing purposes. Thus, where a whole flock is determined to be a study flock and environmental samples are taken, positive samples in certain houses lead to further testing of only those houses, given the proper level of biosecurity as determined by the agency. The new monitoring provision puts Rose Acre in a new and more difficult position which we believe is unmerited.

There is nothing in the administrative record or elsewhere which contests the proposition that SE may be carried by rodents and is not host specific. In fact, there appears to be a consensus that SE is, if not ubiquitous in the poultry environment, then at least quite likely to be present. However, the presence of SE in the environment is not necessarily indicative in itself of contaminated eggs or chickens. Further, the presence of SE in the environment is not necessarily indicative in itself of contaminated eggs or chickens. Further, nothing besides the above-quoted preamble language indicates a likelihood that SE will be transmitted between houses which have *already* been determined to have adequate biosecurity between them.

Environmental testing which is triggered by an outbreak of SE in humans, and applies to the entire flock as a "study flock" makes sense: if a trace back implicates a certain facility, the practical way to narrow the search for the source of contamination is to begin with environmental testing of the entire flock. But there has already been such narrowing, we think that the potential connection between an infected house and other houses which have tested negative and are non-status houses, or have been satisfactorily cleaned and disinfected, is too tenuous to support the monitoring outlined in § 82.38 and conflicts with the agency's treatment of the houses as separate units for purposes of blood and internal organ testing. It is such a tenuous and unproven connection that it renders the provision not rationally related to preventing the spread of SE among poultry or humans. The agency's action in promulgating the monitoring provision was, we conclude, arbitrary and capricious. For this reason, we consider § 82.38 invalid and grant plaintiff's request to enjoin the defendants from applying it against Rose Acre. 5 U.S.C. § 706(2)(A); *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443, 458 (1983).

5. Compensation

Plaintiff also seeks a declaratory judgment that the SE Regulations are invalid for failing to provide compensation to flock owners. Rose Acre asserts that USDA is required by statute to compensate owners of animals condemned for the purpose of preventing the spread of disease, and that the SE Regulations effectively condemn the eggs produced in a restricted house.

A threshold matter which defendants raise concerns jurisdiction. The defendants claim that this Court lacks subject matter jurisdiction over the compensation issue, and that that issue should properly be brought before the United States Claims Court (Claims Court). We agree

that if Rose Acre sought compensation, it would need to do so in the Claims Court. However, as explained below, we do not believe that this limits our power to consider the issue posed by Rose Acre.

Title 28 U.S.C. § 1491(a)(1) provides that "[T]he United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States" founded upon, *inter alia*, "any regulation of an executive department." Under 28 U.S.C. § 1346(a)(2), United States district courts have original jurisdiction concurrent with the Claims Court for certain disputes over income tax claims and for "any other civil action or claim against the United States, not exceeding $10,000," founded upon "any regulation of an executive department."

First, defendants contend that under *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984) and *Outboard Marine Corp. v. Thomas*, 773 F.2d 883, 887 (7th Cir. 1985), this Court lacks subject matter jurisdiction over this claim since the defendants have acted with statutory authority. This argument fails. Although the Court finds that the USDA had the authority to promulgate regulations aimed at controlling SE and imposing testing requirements and restrictions as the present regulations do, we also find that those precise regulations are defective, not because they fail to include a mechanism for indemnification or compensation, but because they expressly indicate that the agency will not provide compensation or indemnification.

The defendants also remind us that 28 U.S.C. § 1346(a)(2) forbids this Court to hear certain claims against the United States in excess of $10,000, and that plaintiff has alleged losses of $50,000 per day. To the extent that Rose Acre were to seek compensation for its losses pursuant to 21 U.S.C. §§ 114a and 134a or the takings clause of the Fifth Amendment, we agree that the $10,000 limitation would control and that Rose Acre would have to make its claims to the Secretary of Ag-

riculture, and then, if those claims went unsatisfied, seek relief in the Claims Court. However, Rose Acre does not appear to be seeking monetary damages in the present action before this Court. It asserts that the USDA must pay compensation under the Fifth Amendment and under the relevant statutes. However, the last paragraph of the complaint, which is the request for relief, states only the following:

> Rose Acre seeks a declaratory judgment that the SE Regulations are invalid because they fail to provide for just compensation to flock owners for the fair market value of eggs restricted under the SE Regulations.

We believe that under the reasoning below, the SE Regulations are invalid, and the injunctive relief sought can and must be awarded by this Court.

Title 21 U.S.C. § 114a states that the Secretary of Agriculture "is authorized to control and eradicate any communicable diseases of livestock or poultry . . . which in the opinion of the Secretary constitute an emergency and threaten the livestock industry of the country, including the payment of claims growing out of destruction of animals (including poultry), and of materials, affected by or exposed to any such disease, in accordance with such regulations as the Secretary may prescribe."

Under 21 U.S.C. § 134a the Secretary may order the destruction of animals and articles that may disseminate communicable poultry disease if they have moved interstate or if the Secretary has declared an extraordinary emergency. Under § 134a(d), the Secretary must pay indemnity for animals that are ordered to be destroyed under the statute.

The Court believes that both of the above statutes are grounds for finding that the Secretary must indemnify poultry owners whose eggs are restricted under the SE Regulations.

In *Yancy v. United States*, 915 F.2d 1534 (Fed. Cir. 1990), plaintiffs brought claims against the United States for compensation pursuant to § 114a and under the takings clause of the Fifth Amendment of the United States Constitution. The Yanceys owned a flock of turkeys which was put under quarantine after an outbreak of Avian Influenza. Although testing showed no evidence of the disease in the Yanceys' flock, they were not allowed to ship their turkeys or hatching eggs interstate during the quarantine. Eventually, they decided to sell the stock for slaughter, since they were spending up to $1,800 weekly to maintain the flock. The court held that the Yanceys did not have a right to statutory compensation under § 114a because Congress had not explicitly created a right of compensation for voluntary slaughter of healthy animals. *Id.* at 1537-39. The court also held that the Yanceys were entitled to compensation under the takings clause of the Fifth Amendment for their loss. *Id.* at 1539-42.

This case differs from *Yancey* in that the USDA is not restricting the movement of eggs or chickens which are deemed to be healthy, but rather, is effectively condemning eggs once the house they come from has been labelled an "infected" house or a "test" house. These eggs are considered to be materials at risk for spreading SE. We think that they fall under the language authorizing payment for destruction of animals and materials exposed to communicable disease.

Further support for the plaintiff's position is to be found in *Julius Goldman's Egg City v. U.S.*, 214 Ct. Cl. 345, 556 F.2d 1096 (Ct. Cl. 1977). In that case the USDA ordered destruction of a poultry flock in order to control exotic Newcastle disease. The owner sought compensation pursuant to 21 U.S.C. §§ 114a and 134a(d). The Secretary provided compensation, but the owner disagreed with the Secretary's appraisal. The United States Court of Claims held that summary judgment was pre-

cluded because there were factual issues to be resolved concerning valuation, and also held that the Secretary's determination of value would be upheld unless arbitrary and capricious. *Id.* at 1100-1101. What is most relevant in the case for our purposes is 1) the Court of Claims' recognition of the Secretary's "far reaching" power to eradicate communicable diseases, and the concomitant obligation for compensation under § 134a, *id.* at 1097; 2) the court's recognition of the mandatory compensation scheme as applied to condemned poultry, *see id.* at 1097; and especially 3) the description of the Secretary's "supplemental" compensation for "lost egg production value" for egg income lost during repopulation, *id.* at 1098. As in *Egg City*, the regulations at issue here cause flock owners to suffer a loss of both birds and egg production value; such owners have a statutory right to compensation.

While the plaintiff contends that requiring a party to seek a remedy for inadequate compensation in the Claims Court is unsound, we do not see any alternative approach for seeking monetary compensation. The method outlined in *Julius Goldman's Egg City* is that first, federal and state appraisers evaluate the poultry; next, the Secretary makes a determination of fair market value; and finally, if the poultry owner is dissatisfied with that determination, the owner makes a claim in the Claims Court. Aside from the fact that this Court could not properly enter into the monetary valuations which are the proper province of the Secretary or the Claims Court, the present posture of this case makes such determinations unnecessary.

Rose Acre argues that the SE Regulations must be invalidated because they fail to provide for just compensation to flock owners for the fair market value of eggs restricted under the SE Regulations. We do not believe that it would be necessary for the regulations to include such a provision, since the compensation mandate is already part of the United States Code: 21 U.S.C. §§ 114a

and 134a explicitly provide for mandatory compensation for animals (including poultry) condemned by the Secretary. Thus, if the SE Regulations were silent on the matter of compensation, we would expect the plaintiff to seek compensation from the Secretary, and, if not satisfied, to bring a claim before the Claims Court.

The SE Regulations are not silent, however. Rather, the agency adopts the position that indemnification will not be provided:

> APHIS does not intend to authorize payments of claims for chickens voluntarily destroyed, to order mandatory depopulation of infected chicken flocks and pay indemnities to the owners of destroyed chickens, or to make indemnity payments for eggs sold for pasteurization.

56 Fed. Reg. 3731-32.

The Administrative Procedure Act, 28 U.S.C. § 553 requires that in general, when an agency promulgates a rule it must follow procedures for notice and comment. Subsection (c) further requires that "[a]fter consideration of the relevant matter presented [by comments], the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose." The plaintiff's request for invalidation raises the issue of whether the comments on indemnification are merely general statements of policy, pursuant to § 553(c), or whether they are rules, and can therefore form part of our review of SE Regulations as a whole.

In *Pacific Gas & Electric Co. v. Federal Power Commission*, 506 F.2d 33 (D.C. Cir. 1974), one of the leading cases treating the policy/rule distinction, the United States Court of Appeals for the District of Columbia described the features of each type of statement. First, a general policy statement is "merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings of adjudications." 506

F.2d at 38. It is "not finally determinative of the issues or rights to which it is addressed, and "it does not establish a "binding norm;" rather, it "announces the agency's tentative intentions for the future." *Id.* On the other hand, a substantive rule "establishes a standard of conduct which has the force of law." *Id.*

Acknowledging the tenuousness of the distinction, the same court elaborated further in 1987, focusing particularly on whether a statement has a present and binding effect, whether it leaves discretion in the agency, and whether the particular language used indicates the agency's intention. *Community Nutrition Institute v. Young*, 818 F.2d 943, 946-47 (D.CV. Cir. 1987). Thus, "mandatory, definitive language is a powerful, even potentially dispositive, factor suggesting that [elements in the regulations] are substantive rules." *Id.* at 947.

The policy/rule distinction is usually raised where an agency's ability to rely on a statement published without notice and comment is questioned. However, the distinction is relevant to reviewability as well. "General policy statements, because they are ineffective except as applied and defended in specific proceedings, are often insulated from judicial review at the time of issuance." *Limerick Ecology Action v. U.S. Nuclear Regulatory Commission*, 869 F.2d 719, 735-36 (3rd Cir. 1989).

Here, the agency's statement on indemnification contained in the Final SE Regulations appears to have the characteristics of a rule. The question of indemnification was subject to notice and comment, and agency's published preamble responded to comments submitted by legislators, researchers, and industry representatives. While the phrase "does not intend" could be considered either definite or tentative, we believe that read in context, it is more than a tentative statement, especially since the SE Interim Regulations had already affected poultry owners such as the plaintiff. The language has a present effect in that Rose Acre and other owners cannot expect agency

initiation of the procedures for indemnification. Further, it binds the agency to refrain from compensating the poultry owners. The agency has no discretion to pay any amount of compensation to any owners affected by the regulations. The Court concludes that the comments on indemnification contained in the preamble to the Final SE Regulations are rules, as are the enumerated provisions of the Regulations. Accordingly, we apply the same standards of review to the agency's non-indemnification provision.

Comments in the preamble to the Final SE Regulations attempt to justify USDA's decision not to provide for indemnification. The comments state that neither federal law nor APHIS regulations require compensation for animals voluntarily destroyed, that present conditions do not require mandatory depopulation, and that the current SE situation and federal actions will not cause severe economic impact on the affected agricultural industry.[5] Fed. Reg. 3730, 3731 (Jan. 30, 1991). The stipulated facts and trial testimony disprove each of these contentions.

First, the SE Regulations force the poultry owners either to depopulate infected and test houses (i.e., to kill the chickens) or to sell eggs from such houses at a loss. We agree with the plaintiff that this is effectively a condemnation of the selected eggs and chickens, and is not a voluntary destruction.

Second, although the agency now states that the present situation does not call for mandatory depopulation, *see* Fed. Reg. 3730, 3731, the SE Regulations treat the industry as if there is an emergency—recall the basis of immediate promulgation of the SE Interim Regulation—and

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[5] Compare comments earlier in the preamble to the Final SE Regulation observing that "SE has a severe impact on the egg production industry by reducing consumer demand and disrupting egg marketing channels." 56 Fed. Reg. 3730.

result in the practical effect of condemnation of chickens and eggs in affected poultry houses. As Rose Acre suggests, USDA is basically withholding a declaration of an emergency while imposing restrictions as if it has declared an emergency. By labelling certain houses "test" and "infected," USDA effectively condemns the eggs produced in those houses to be sold at less than cost. Chickens are destroyed in the testing process, and are destroyed as to their economic value when they are part of a house labelled "infected." As Rose Acre asserts, if USDA effectively orders the destruction of animals by eliminating their economic value, it cannot avoid the obligation to compensate owners by claiming that there is no "extraordinary emergency."

Third, the administrative record and the testimony at trial support the fact that the SE Regulations could well have a devastating effect upon the poultry industry in the United States. The poultry industry's compelling call for indemnification is supported by the comments submitted from many state departments of health.

USDA has promulgated a regulatory scheme which we believe impermissibly places the economic burden of condemnation on poultry flock owners rather than on the agency. The record indicates that the agency may not have established such a scheme if it also had to plan on indemnifying the flock owners. Because the non-indemnification provision is inextricably bound up with the enumerated substantive provisions, we conclude that a finding of invalidity on the first is fatal to the whole.

The Court concludes that the agency's decision not to indemnify affected poultry owners is arbitrary and capricious, is not "based on a consideration of the relevant factors" and is a "clear error in judgment." *Motor Vehicle Manufacturers Ass'n*, 463 U.S. at 43, 103 S.Ct. at 2866-67, 77 L.Ed.2d at 458. The Secretary's express denial of compensation renders the SE Regulations invalid; accordingly, the plaintiff's request for a declaratory judg-

ment invalidating them must be granted on this ground, as well as upon that set out in the previous section of this opinion.

Conclusion

The Court finds that the defendants had the authority to promulgate SE Interim and Final Regulations, that application of the regulations does not deprive the plaintiffs of due process by lack of administrative hearing, and that the SE Regulations as a whole are not arbitrary and capricious for lack of scientific basis. On the other hand, the new monitoring provision in the Final SE Regulation, § 82.38, is invalid because it does not bear a rational relationship to the protection or promotion of animal or human health and is therefore arbitrary and capricious. Moreover, the SE Regulations as a whole are invalid in that they explicitly contemplate that no mechanism for compensation shall be provided for eggs which are restricted from being sold in interstate commerce as table eggs or for chickens executed for purposes of testing or depopulation. Because of the express non-indemnification provision, the SE Regulations are invalid as conflicting both with existing statutory law and with the Fifth Amendment.

Judgment will be entered in accordance herewith.

Dated this 5th day of June, 1991.

/s/ S. Hugh Dillin
S. HUGH DILLIN
Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

No. NA 90-175-C

ROSE ACRE FARMS, INC.,
Plaintiff,

-vs-

EDWARD MADIGAN, Secretary of Agriculture of the United States, JAMES W. GLOSSER, Administrator, Animal and Plant Health Inspection Service of the United States Department of Agriculture, and the UNITED STATES DEPARTMENT OF AGRICULTURE,
Defendants.

AMENDMENT TO ENTRY

This Court's Entry of June 5, 1991 in the above captioned case is hereby amended to reflect that, due to a printing error, two lines were omitted from pages 22-23. The last full paragraph on page 22-23, as amended, provides as follows:

> Plaintiff's claim raises two issues. First, we consider whether the language of the monitoring provision applies to cleaned and disinfected houses. Concluding that it does apply, we next consider whether the monitoring provision as a whole is valid.

Dated this 14th day of June, 1991.

/s/ S. Hugh Dillin
S. HUGH DILLIN
Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

No. NA 90-175-C

ROSE ACRE FARMS, INC.,
Plaintiff,

-vs-

EDWARD MADIGAN, Secretary of Agriculture of the United States, JAMES W. GLOSSER, Administrator, Animal and Plant Health Inspection Service of the United States Department of Agriculture, and the UNITED STATES DEPARTMENT OF AGRICULTURE,
Defendants.

JUDGMENT

The Court having this day made and entered its findings of fact and conclusions of law in the above entitled action in the form of a memorandum of decision reading as follows: (H. I.)

IT IS THEREFORE CONSIDERED AND ADJUDGED that the Final SE Regulation, found at 56 Fed. Reg. 3730, 9 C.F.R. §§ 82.30-82.38 (1991) is unlawful as a whole in that the United States Secretary of Agriculture has expressly stated that no compensation or indemnification will be provided to poultry owners who, in compliance with the regulations, must destroy chickens and/or divert eggs for sale from commercial markets as table eggs, contrary both to certain statutes and to the Constitution.

IT IS FURTHER CONSIDERED AND ADJUDGED that § 82.38 of said regulation is arbitrary and capricious, and not in accordance with law for such reason.

IT IS FURTHER CONSIDERED AND ADJUDGED that the defendants be, and they are hereby enjoined from applying to the plaintiff said Final SE Regulation, or its predecessor, Interim SE Regulation (55 Fed. Reg. 5576, 9 C.F.R. §§ 32.30-82.36 (1990)).

All of which is adjudged, ordered and decreed this 5th day of June, 1991.

/s/ S. Hugh Dillin
S. HUGH DILLIN
Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

February 26, 1992

Before

HON. WILLIAM J. BAUER, Chief Judge

HON. FRANK H. EASTERBROOK, Circuit Judge

HON. MICHAEL S. KANNE, Circuit Judge

Nos. 91-2358 and 91-2514

ROSE ACRE FARMS, INC.,
Plaintiff-Appellee,
Cross-Appellant,

v.

EDWARD MADIGAN, Secretary of Agriculture, *et al.*,
Defendants-Appellants,
Cross-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana,
New Albany Division

No. NA 90-175-C—S. Hugh Dillin, *Judge*

ORDER

Plaintiff-Appellee, Cross-Appellant filed a petition for rehearing on February 24, 1992. All of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX D

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

5 USC 702

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 USC 704

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has

been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 USC 706

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

21 USC 134a

§ 134a. Seizure, quarantine, and disposal of livestock or poultry to guard against introduction or dissemination of communicable disease

(a) Authority of Secretary

The Secretary, whenever he deems it necessary in order to guard against the introduction or dissemination of a communicable disease of livestock or poultry, may seize, quarantine, and dispose of, in a reasonable manner taking into consideration the nature of the disease and the necessity of such action to protect the livestock or poultry of the United States: (1) any animals which he finds are moving or are being handled or have moved or have been handled in interstate or foreign commerce contrary to any law or regulation administered by him for the prevention of the introduction or dissemination of any communicable disease of livestock or poultry; (2) any animals which he finds are moving into the United States, or interstate, and are affected with or have been exposed to any communicable disease dangerous to livestock or poultry; and (3) any animals which he finds have moved into the United States, or interstate, and at the time of such movement were so affected or exposed.

(b) Determination of extraordinary emergency due to dangerous communicable disease; seizure, quarantine, and disposal of animals; action authorized only if adequate measures not taken by State or other jurisdiction; notice to State or other jurisdiction.

Whereas the existence of any dangerous, communicable disease of livestock or poultry, such as foot-and-mouth disease, rinderpest, or European fowl pest, on any premises in the United States would constitute a threat to livestock and poultry of the Nation and would seriously

burden interstate and foreign commerce, whenever the Secretary determines that an extraordinary emergency exists because of the outbreak of such a disease anywhere in the United States, and that such outbreak threatens the livestock or poultry of the United States, he may seize, quarantine, and dispose of, in such manner as he deems necessary or appropriate, any animals in the United States which he finds are or have been affected with or exposed to any such disease and the carcasses of any such animals and any products and articles which he finds were so related to such animals as to be likely to be a means of disseminating any such disease: *Provided*, That action shall be taken under this subsection only if the Secretary finds that adequate measures are not being taken by the State or other jurisdiction. The Secretary shall notify the appropriate official of the State or other jurisdiction before any action is taken in any such State or other jurisdiction pursuant to this subsection.

(c) Notice to owner to quarantine or to dispose of animal, carcass, product, or article; action on failure to comply; costs

The Secretary in writing may order the owner of any animal, carcass, product, or article referred to in subsection (a) or (b) of this section, or the agent of such owner, to maintain in quarantine, and to dispose of such animal, carcass, product, or article in such manner as the Secretary may direct pursuant to authority vested in him by such subsections. If such owner or agent fails to do so after receipt of such notice, the Secretary may take action as authorized by said subsections (a) and (b) and recover from such owner or agent the reasonable costs of any care, handling, and disposal incurred by the Secretary in connection therewith. Such costs shall not constitute a lien against the animals, carcasses, products, or articles involved. Costs collected under this section shall be credited to the current appropriation for carrying out animal disease control activities of the Department.

(d) Compensation of owner; fair market value; payments from State or other source; availability of funds

Except as provided in subsection (e) of this section, the Secretary shall compensate the owner of any animal, carcass, product, or article destroyed pursuant to the provisions of this section. Such compensation shall be based upon the fair market value as determined by the Secretary, of any such animal, carcass, product, or article at the time of the destruction thereof. Compensation paid any owner under this subsection shall not exceed the difference between any compensation received by such owner from a State or other source and such fair market value of the animal, carcass, product, or article. Funds in the Treasury available for carrying out animal disease control activities of the Department of Agriculture shall be used for carrying out this subsection.

(e) Restriction on payment of compensation in cases of violation of law or regulation

No such payment shall be made by the Secretary for any animal, carcass, product, or article which has been moved or handled by the owner thereof or his agent knowingly in violation of a law or regulation administered by the Secretary for the prevention of the interstate dissemination of the communicable disease, for which the animal, carcass, product, or article was destroyed or a law or regulation for the enforcement of which the Secretary enters or has entered into a cooperative agreement for the control and eradication of such disease, or for any animal which has moved into the United States contrary to such law or regulation administered by the Secretary for the prevention of the introduction of a communicable disease of livestock or poultry.

28 USC 1491

§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Claims Court shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10 (a)(1) of the Contract Disputes Act of 1978.

(3) To afford complete relief on any contract claim brought before the contract is awarded, the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief. In exercising this jurisdiction, the court shall give

due regard to the interests of national defense and national security.

(b) Nothing herein shall be construed to give the United States Claims Court jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action against, or founded on conduct of, the Tennessee Valley Authority, or to amend or modify the provisions of the Tennessee Valley Authority Act of 1933 with respect to actions by or against the Authority.

9 C.F.R. § 71.3
As amended by 56 Fed. Reg. 3730 (January 30, 1991)

§ 71.3 Interstate movement of diseased animals and poultry generally prohibited.

(a) Animals or poultry affected with any of the following diseases, which are endemic to the United States: Equine piroplasmosis, bovine piroplasmosis or splenetic fever, scabies in cattle, hog cholera, acute swine erysipelas, tuberculosis, paratuberculosis, brucellosis, scrapie, bluetongue, anthrax, psittacosis or ornithosis, poultry disease caused by adding *Salmonella enteritidis* serotype *enteritidis*, and Newcastle disease, or any other communicable disease which is endemic to the United States, or which are cattle fever tick infested, shall not be moved interstate.

(b) Animals or poultry affected with any of the following diseases, not known to exist in the United States: foot-and-mouth disease, rinderpest, African swine fever, Teschen disease, contagious bovine pleuropneumonia, European fowl pest, dourine, vesicular exanthema, screwworms and glanders, scabies in sheep or any other communicable foreign disease not known to exist in the United States, shall not be moved interstate.

(c) Notwithstanding the provisions of paragraphs (a) and (b) of this section:

(1) Domestic animals which have reacted to a test recognized by the Secretary of Agriculture for brucellosis, or paratuberculosis, which are not affected with any other disease referred to in this section and are not tick infested, may be moved interstate in accordance with part 78 of this chapter in the case of brucellosis reactors and with the provisions of part 80 of this subchapter in the case of paratuberculosis reactors;

(2) Cattle which have reacted to the tuberculin test, which are not affected with any other disease referred to in this section and are not tick infested, may be moved interstate in accordance with the provisions of § 77.8 of this subchapter; and

(3) poultry affected with disease caused by *Salmonella enteritidis* serotype *enteritidis* may be moved interstate in accordance with part 82 of this chapter.

(d) Notwithstanding the provisions of paragraphs (a) and (b) of this section, livestock which is found to be diseased may be moved interstate in accordance with paragraphs (d) (1) through (6) of this section: *Provided*, That such livestock is not tick infested or affected with any disease referred to in this section other than the diseases named in this paragraph: *And provided further*, That such livestock is accompanied by a certificate, issued by an APHIS or State inspector or accredited veterinarian stating the destination of the animals; the purpose for which they are to be moved; the number of animals covered by the certificate; the point from which the animals are moved interstate; and the name and address of the owner or shipper.

(1) Livestock affected with one or more of the following diseases may be moved interstate for immediate slaughter to a slaughtering establishment where State or Federal meat inspection is maintained; Actinomycosis, actinobacillosis, anaplasmosis, atrophic rhinitis, contagious ecthyma, foot rot, infectious keratitis, ram epididymitis, ringworm, swine influenze, arthritis (simple lesions only), and shipping fever.

(2) Cattle with slight unopened cases of actinomycosis or actinobacillosis (or both) may be moved interstate to a feed lot in the State of destination: *Provided*, That such cattle are not affected with any other disease named in this paragraph.

(3) Sheep affected with or exposed to contagious ecthyma may be moved interstate to a feed lot located in a

State the laws, rules, or regulations of which require that such sheep be segerated or quarantined under a permit from an official of such State: *Provided*, That such sheep are not affected with any other disease named in this paragraph.

(4) Livestock affected with one or more of the following diseases may be moved interstate for any purpose to a State the laws, rules, or regulations of which require that such livestock be segregated or quarantined under a permit from the appropriate livestock sanitary official of such State: actinomycosis, actinobacillosis, contagious ecthyma, foot rot, and shipping fever: *Provided*, That such livestock is not affected with any other disease named in this paragraph.

(5) Livestock affected with infectious keratitis or ringworm (or both) may be moved interstate for any purpose if treated under the supervision of an APHIS or State inspector or an accredited veterinarian prior to movement: *Provided*, That such livestock is not affected with any other disease named in this paragraph. Livestock affected with infectious keratitis or ringworm (or both) and also with another disease named in this paragraph may be moved interstate only under the applicable provisions of paragraphs (d) (1) through (4) of this section after being so treated for infectious keratitis or ringworm (or both). Such livestock will be subject to further treatment at destination, if required.

(6) Other Movements. The Administrator may provide for the movement, not otherwise provided for in this paragraph, of animals affected with the diseases named in paragraph (d) (1) of this section, under such conditions as he may prescribe to prevent the spread of disease. The Administrator will promptly notify the appropriate livestock sanitary officials of the States involved of any such action.

(e) Nothwithstanding the provisions of paragraphs (a) and (b) of this section, the Administrator in specific

cases and under such conditions as he may prescribe to prevent the dissemination of disease may provide for the interstate movement of individual animals affected with contagious, infectious, or communicable disease to a designated diagnostic or research facility when accompanied by a permit from the appropriate livestock sanitary official in the State of destination: *Provided*, That animals so moved shall be maintained in quarantine at such designated facility until freed of disease as determined by tests recognized by the Department, until natural death, or until disposal by euthanasia.

(f) Before offering cattle or other livestock or poultry for interstate transportation, transporting them interstate, or introducing them into any stockyards or upon routes of traffic for interstate transportation, all persons, companies, or corporations are required to exercise reasonable diligence to ascertain whether such animals or poultry are affected with any contagious, infectious, or communicable disease, or have been exposed to the contagion or infection of any such disease by contact with other animals or poultry so diseased or by location in pens, cars, or other vehicles, or upon premises that have contained animals or poultry so diseased.

9 C.F.R. §§ 82.30-82.38
As amended by 56 Fed. Reg. 3730 (January 30, 1991)
and 57 Fed. Reg. 776 (January 9, 1992)

Subpart B—Poultry Disease Caused by Salmonella Enteritidis Serotype Enteritidis

§ 82.30 Definitions.

As used in connection with this subpart, the following terms shall have the meaning set forth in this section.

Administrator. The Administrator of the Animal and Plant Health Inspection Service or any individual authorized to act for the Administrator.

Animal and Plant Health Inspection Service (APHIS). The Animal and Plant Health Inspection Service of the United States Department of Agriculture.

Authorized laboratory. A laboratory approved by the Administrator to conduct tests in accordance with this subpart. Application for accreditation shall be made in writing by the owner or operator of the laboratory and sent to the Administrator, Animal and Plant Health Inspection Service, c/o Sheep, Goat, Equine, and Poultry Diseases Staff, Veterinary Services, U.S. Department of Agriculture, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782.

The applying laboratory will bear all costs associated with its application process. The Administrator will approve an authorized laboratory only after consulting with the State animal health official in the State in which the laboratory is located and after determining that the laboratory:

(1) Is supervised by a person holding, as a minimum, a bachelor's degree in either chemistry, microbiology, or a related field and having 1 year's experience in diagnostic microbiology, or equivalent qualifications, as determined by the Administrator;

(2) Has technical personnel assigned to conduct the tests who have received training prescribed by the National Veterinary Services Laboratories (NVSL);

(3) Uses reagents, media, and antigen approved by NVSL;

(4) Maintains laboratory quality control records for the most recent 3 years that samples have been analyzed under this Program;

(5) Demonstrates acceptable levels of systematic laboratory difference, variability, and individual large deviations in the identification of microorganisms. An applying laboratory will successfully demonstrate these capabilities if its diagnostic results from annual check test proficiency studies satisfy the criteria of NVSL;

(6) Follows standard test protocols approved by NVSL;

(7) Maintains complete records of the receipt, analysis, and disposition of official samples for the most recent 3 years that samples have been analyzed under this Program;

(8) Reports results of all tests ordered in accordance with this subpart or in accordance with § 145.23 (d) of this chapter to the State animal health official and APHIS.[1]

(9) Maintains a standards book, which is a permanently bound book with sequentially numbered pages, contain-

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[1] Training requirements, standard test protocols, and check test proficiency requirements prescribed by the National Veterinary Services Laboratories and the names and addresses of authorized laboratories can be obtained by writing to the Administrator, c/o Sheep, Goat, Equine, and Poultry Diseases Staff, Veterinary Services, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, Federal Building, 6506 Belcrest Road, Hyattsville, MD 20782.

ing all readings and calculations for diagnostic tests and calibration of instruments. All entries are to be dated and signed by the analyst immediately upon completion of the entry and by his/her supervisor within 2 working days. The standards book is to be retained for a period of 3 years after the last entry is made;

(10) Analyzes NVSL check test proficiency samples and returns the results to NVSL within 3 weeks of sample receipt. This must be done whenever requested by NVSL and at no cost to USDA;

(11) Informs the Administrator by certified or registered mail, within 30 days, when there is any change in the laboratory's ownership, officers, directors, supervisory personnel, or other responsibly connected individual or entity; and

(12) Permits any duly authorized representative of the Secretary to perform both announced and unannounced on-site laboratory reviews of facilities and records during normal business hours and to copy all such records.

The Administrator may revoke the authorized status of a laboratory after determining that the laboratory fails to meet any requirement of this definition. The revocation will be effective on the date written notice of revocation is given to to [sic] the owner or operator of the laboratory. A laboratory whose accreditation has been revoked may reapply for authorized laboratory status no sooner than 6 months after the effective date of revocation, and must provide written documentation specifying what corrections were made.

Certified Salmonella enteritidis serotype enteritidis Tested Free Flocks. Egg-type chicken breeding flocks that are classified "U.S. Sanitation Monitored" under the National Poultry Improvement Plan (NPIP), or meet the requirements of a State classification plan determined by the Administrator to be equivalent to the NPIP, in accordance with § 145.23(d) of this chapter.

Egg production flock. A flock maintained for the purpose of producing eggs for human consumption.

Federal representative. An individual employed and authorized by the Federal government to perform the tasks required by this subpart.

Flock. All of the poultry on one premise.

Hatching eggs. Eggs in which young chickens are allowed to develop.

Infected flock. A flock that does not contain separate poultry houses as defined by this section, and in which any poultry has tested positive for *Salmonella enteritidis* serotype *enteritidis* in accordance with the blood and internal organ tests of § 82.32(c) or (e)(2) of this subpart.

Infected poultry house. A poultry house containing chickens determined to be infected with *Salmonella enteritidis* serotype *enteritidis* in accordance with § 82.32 (c) or (e)(2) of this subpart.

Internal organs. All internal organs except for the lungs and organs of the gastrointestinal tract.

Interstate. From one State into or through any other State.

Move (moving, moved, movement). Shipped, offered for shipment to a common carrier, received for transportation or transported by a common carrier, or carried, transported, moved, or allowed to be moved by any means.

Multiplier breeding flock. A flock that is intended for the production of hatching eggs used for the purpose of producing progeny for commercial egg production.

Newly-hatched chicks. Chicks that have not been fed or watered for the first time.

Poultry. Chickens of all ages, including eggs for hatching.

Poultry house. A building or other structure used to house poultry.

Primary breeding flock. A flock composed of one or more generations that is maintained for the purpose of

establishing or continuing multiplier breeding flocks for the ultimate purpose of commercial egg production.

Separate poultry house. A poultry house that has been determined by a Federal or State representative to have biosecurity to prevent the transmission of communicable disease to other poultry houses. Biosecurity means that flock management procedures are in place to ensure that there is no contact between poultry houses through exposure to chickens, feed, water, manure, equipment, or personnel from other poultry houses.

State. Any State, the District of Columbia, Puerto Rico, Guam, the Northern Mariana Islands, the Virgin Islands of the United States, and any other territory or possession of the United States.

State representative. An individual employed in animal health work and authorized by a State or political subdivision of a State to perform the tasks required by this subpart.

Study flock. A flock determined in accordance with § 82.32(a) of this part to be a study flock, based on:

(1) A determination by a Federal representative or State representative through epidemoiologic investigation that the flock is the probable source of disease in an outbreak of disease in poultry or humans caused by *Salmonella enteritidis* serotype *enteritidis*, or

(2) A determination by a Federal representative or State representative that the flock has received progeny from a primary breeding flock or multiplier breeding flock that has had a positive organ sample in accordance with § 145.23(d) of this chapter, after the date of the last negative environmental sample for the primary breeding flock or multiplier breeding flock in accordance with § 145.23(d) of this chapter.

Test flock. A flock that does not contain separate poultry houses as defined by this section, and in which any

manure and egg transport machinery samples have tested positive for *Salmonella enteritidis* serotype *enteritidis* in accordance with § 82.32(b) or (b)(2)(ii) of this subpart.

Test poultry house. A poultry house determined in accordance with § 82.32(b) of this subpart to have tested positive for *Salmonella enteritidis* serotype *enteritidis* by isolation of the bacterium from one or more manure or egg transport machinery samples, and designated for blood and internal organ testing in accordance with § 82.32(c) or (b)(2)(ii) of this subpart.

§ 82.31 Applicability.

The regulations in this subpart apply only to primary and multiplier breeding flocks used for the purpose of producing progeny for commercial egg production, and to egg production flocks used for the purpose of producing table eggs for sale or other distribution in interstate commerce or for export.

§ 82.32 Identification of study flocks, test poultry houses, test flocks, infected poultry houses, and infected flocks.

Only a Federal representative or State representative [2] may make a determination in accordance with this subpart that an egg production flock is a study flock, a test flock, or an infected flock, or that a poultry house is a test poultry house or an infected poultry house. The Federal representative or State representative shall also determine which subunits of a flock meet the definition of a separate poultry house in § 82.30 of this subpart. Immediately after a study flock, test flock, infected flock, test poultry house, or infected poultry house is identified, a Federal representative or a State repre-

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[2] The location of Federal or State representatives can be obtained by writing to the Administrator, c/o Sheep, Goat, Equine, and Poultry Diseases Staff, Veterinary Services, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782.

sentative shall notify in writing the person in control of the flock that his or her flock has been determined to be a study flock, test flock, or infected flock, or that specified poultry houses in the flock have been determined to be test poultry houses or infected poultry houses. At any time after such notification, the person in control of such flock, test poultry house, or infected poultry house, upon request of a Federal representative or a State representative, shall make available for review and copying all records maintained in accordance with 7 CFR 59.200 [3] and all other records of the shipment of poultry and poultry products to and from the flock.

(a) *Study flocks.* An egg production flock shall be determined to be a study flock under the circumstances described in paragraphs (a)(1) or (a)(2) of this section:

(1) The Administrator determines that the flock has been implicated as the probable source of disease in an outbreak of disease in humans or poultry caused by *Salmonella enteritidis* serotype *enteritidis.* The Administrator shall make such a determination after he or she determines that:

(i) Epidemiologic reports from Federal or State health agencies identify the cause of the outbreak as *Salmonella enteritidis* serotype *enteritidis*;

(ii) Eggs were the probable source of the *Salmonella enteritidis* serotype *enteritidis* organisms that caused the outbreak; and

(iii) Shipping records or other evidence reveal that the probable source of the eggs was the flock determined to be a study flock.

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[3] In accordance with 7 CFR 59.200, persons engaged in the business of transporting, shipping, receiving, holding, or handling eggs or egg products in commerce shall maintain records for two years showing the receipt, delivery, sale, movement, and disposition of all eggs and egg products handled by them, and shall, upon the request of an authorized representative of the Secretary, permit him, at reasonable times, to have access to and to copy all such records.

(2) A Federal representative or a State representative determines that the flock has received progeny from an egg-type chicken breeding flock that has had *Salmonella enteritidis* serotype *enteritidis* recovered from the internal organs of one or more chickens through testing in accordance with § 145.23(d) of this chapter, at any time since the last negative environmental sample tested for that egg-type chicken breeding house in accordance with § 145.23(d) of this chapter.

(b) *Test poultry houses and test flocks.* A a [sic] separate poultry house in a study flock shall be determined to be a test poultry house if manure and egg transport machinery samples from the house are collected and tested in accordance with this paragraph and one or more of the samples from the house tests positive for *Salmonella enteritidis* serotype *enteritidis*. The entire flock shall be determined to be a test flock if the flock does not contain separate poultry houses as defined in § 82.30 of this chapter, and if manure and egg transport machinery samples from any poultry house in the flock test positive for *Salmonella enteritidis* serotype *enteritidis* in accordance with this paragraph. A study flock shall be determined to be a test flock if the person in control of the flock has refused to schedule collection of samples in accordance with paragraph (b)(1) of this section within 48 hours of the time the person in control of the flock was notified in writing by a Federal representative or a State representative that his flock was determined to be a study flock, or if the actions of the person in control of the flock prevent completion of collection of samples in accordance with paragraph (b)(1) of this section within 15 days of the time the person in control of the flock was notified by a Federal representative or a State representative that his flock was determined to be a study flock. If a Federal representative determines on the basis of epidemiologic investigation that any flock is the probable source of disease in three or more outbreaks of disease in humans caused by *Salmonella enteritidis* serotype

enteritidis, that flock shall be determined to be a test flock; however, such test flocks shall have environmental samples collected and tested in accordance with paragraphs (b) (1) and (d) of this section, and any separate poultry houses that test negative in accordance with paragraph (d) of this section shall be released from test poultry house status.

(1) *Sample collection.* A Federal representative or a State representative shall initiate testing of each study flock by collecting the following samples for testing:

(i) *Manure samples.* The Federal representative or State representative shall collect two simultaneous manure samples from each row of cages, or from the floor area if there are no cages, using a sterile 4-inch by 4-inch gauze sponge for each sample. The manure sample shall be collected by fastening the gauze sponges to the scraper frame and running the scraper the full length of the row of cages, if a manure scraper is used on the row; otherwise, collect the manure sample by dragging the swab along the manure pile beneath the cages, or once along the full length of the floor if there are no cages. The gauze sponges used to collect manure samples shall be placed in an 18-ounce whirl-pak plastic bag containing double strength skim milk, and the bag shall be marked with the location of the row or floor area from which the sample is taken.

(ii) *Egg transport machinery samples.* The Federal representative or State representative shall collect one egg transport machinery sample from each row of cages by wiping the egg transport belt and egg escalator, using a sterile 4-inch by 4-inch gauze sponge for each sample. The gauze sponge used to collect egg transport machinery samples for each row shall be placed in an 18-ounce whirl-pak plastic bag containing double strength skim milk, and the bag shall be marked with the location of the row from which the sample is taken.

(2) *Release from test poultry house or test flock status; post-release sampling and testing.* (i) A Federal or State

representative shall determine that a separate poultry house is no longer a test poultry house, or that a flock is no longer a test flock, and shall notify in writing the person in control of the house or flock of that determination, after the Federal or State representative determines that, after the house or flock has been determined to be in test status:

(A) the house or flock has been depopulated, and cleaned, washed, and disinfected in accordance with § 82.37 of this subpart; or,

(B) blood and internal organ samples from the chickens in the house or flock have been collected and tested in accordance with paragraphs (c) and (d) of this section with no recovery of *Salmonella enteritidis* serotype *enteritidis.*

(ii) For 18 months following the repopulation of a flock or house released from test status, due to depopulation, cleaning, washing, and disinfection pursuant to paragraph (b) (2) (i) (A) of this section, or for 18 months following release of a flock or house from test status, due to testing negative for *Salmonella enteritidis* serotype *enteritidis* pursuant to paragraph (b) (2) (i) (B) of this section, the Administrator may make such periodic collection and testing of samples from the flock or house as he or she determines to be necessary to ensure that the house or flock is free of *Salmonella enteritidis* serotype *enteritidis; provided:* that such sample collection and testing will not be performed if the flock or house is participating in a voluntary program approved by the Administrator to control *Salmonella enteritidis* serotype *enteritidis.* If one or more manure or egg transport machinery samples collected and tested in accordance with the provisions of paragraphs (b) (1) and (d) of this section test positive for *Salmonella enteritidis* serotype *enteritidis,* the flock or house from which the sample was taken shall be determined to be a test flock or test poultry house. If one or more internal organ samples collected and tested in ac-

cordance with the provisions of paragraphs (c) (2) and (d) of this section test positive for *Salmonella enteritidis* serotype *enteritidis*, the flock or house from which the sample was taken shall be determined to be an infected flock or infected poultry house. If the person in control of the flock or poultry house has refused to schedule sample collection within 48 hours of the time a Federal or State representative requests such sample collection, or has refused to allow completion of sample collection according to the schedule set by the Federal or State representative, the flock or poultry house shall be determined to be in test status.

(c) *Infected poultry houses and infected flocks.* A test poultry house shall be determined to be an infected poultry house if the house is tested in accordance with this paragraph and *Salmonella enteritidis* serotype *enteritidis* is recovered from the internal organs of one or more chickens in the house. A test flock shall be determined to be an infected flock if the flock is tested in accordance with this paragraph and *Salmonella enteritidis* serotype *enteritidis* is recovered from the internal organs of one or more chickens in the flock. If *Salmonella enteritidis* serotype *enteritidis* is not recovered from the internal organ samples, a second set of blood and internal organ samples from poultry in that house or flock shall be collected and tested in accordance with this paragraph beginning not less than 15 days after the date the first internal organ samples are collected.

(1) *Blood samples.* The Federal representative or State representative shall collect blood samples from 300 chickens in each poultry house, randomly selected from the cage banks that provided manure samples that tested positive in accordance with paragraph (b) (1) of this section, and shall also collect blood samples from any chickens that show clinical signs of infection with *Salmonella enteritidis*. Blood samples shall be tested in accordance with the procedures for the stained-antigen,

rapid, whole-blood test described in § 147.3 of this chapter. The Federal or State representative shall band each chicken tested with a band bearing a unique number identifying the chicken with the blood test results.

(2) *Internal organ samples.* The Federal representative or State representative shall collect a total of 60 chickens from each test poultry house, or each house of a test flock, and send the chickens to an authorized laboratory for testing of internal organs. The Federal representative or State representative shall include in this sample all chickens that reacted to the blood test in paragraph (c)(1) of this section. If *Salmonella enteritidis* serotype *enteritidis* is recovered from any manure samples tested in accordance with paragraph (b)(1)(i) of this section, the Federal representative or State representative shall collect additional chickens from the rows that supplied the manure samples from which *Salmonella enteritidis* serotype *enteritidis* was recovered, to bring the total number of chickens from each house submitted for internal organ testing to 60.

(d) *Test methods for samples.* Blood samples shall be tested either at the flock premises or at an authorized laboratory, and all other samples shall be sent for testing to an authorized laboratory. Blood samples shall be tested using a stained-antigen, rapid, whole blood test, in accordance with § 147.3 of this chapter. Manure, egg transport machinery, and internal organ samples shall be sent for testing to an authorized laboratory, where they shall be cultured for identification of *Salmonella enteritidis* serotype *enteritidis* as follows:

(1) *Manure and egg transport machinery samples.* Place each sample in approximately 10 times its volume of Hajna tetrathionate or Mueller-Kauffman tetrathionate selective enrichment broth, and incubate at 41°C for 24 hours. Use each enriched sample to inoculate an agar plate of Brilliant green agar supplemented with novo-

biocin or XLT4 agar, and incubate the plates at 37°C for 24 hours. Inoculate at least 5 *Salmonella*-suspect colonies from each sample to slants of triple-sugar iron (TSI) agar and lysine-iron (LI) agar, and incubate at 37°C for 24 hours. Cultures showing typical reactions on TSI or LI or both shall be screened with Group D antiserum. Send all Group D isolates to the National Veterinary Services Laboratories for further characterization.

(2) *Internal organ samples.* Place each sample in approximately 10 times its volume of Hajna tetrathionate or Mueller-Kauffman tetrathionate selective enrichment broth, and incubate at 37°C for 24 hours. Use each sample to inoculate an agar plate of Brilliant green agar supplemented with novobiocin or XLT4 agar, and a supplemental plate of MacConkey agar if so desired, and incubate the plates at 37°C for 24 hours. Inoculate at least 5 *Salmonella*-suspect colonies from each sample to slants of TSI agar and LI agar, and incubate at 37°C for 24 hours. Cultures showing typical reactions on TSI or LI or both shall be screened with Group D antiserum. Send all Group D isolates to the National Veterinary Services Laboratories for further characterization.

(e) *Release from infected poultry house status or infected flock status; post-release sampling and testing.* (1) A Federal or State representative shall determine that a house or flock is no longer an infected poultry house or an infected flock, and shall notify in writing the person in control of the house or flock of that determination, if the Federal or State representative determines that, after the house or flock has been determined to be infected:

(i) The house or flock has been depopulated, and cleaned, washed, and disinfected in accordance with § 82.37 of this subpart; or,

(ii) Internal organ samples from the chickens in the house or flock have been collected and tested in accord-

ance with paragraphs (c) and (d) of this section, with no recovery of *Salmonella enteritidis* serotype *enteritidis*.

(2) For 18 months following the repopulation of a flock or house released from infected status, due to depopulation, cleaning, washing, and disinfection pursuant to paragraph (e) (1) (i) of this section, for 18 months following release of a flock or house from infected status, due to testing negative for *Salmonella enteritidis* serotype *enteritidis* pursuant to paragraph (e) (1) (ii) of this section, the Administrator may make such periodic collection and testing of samples from the flock or house as he or she determines to be necessary to ensure that the house or flock is free of *Salmonella enteritidis* serotype *enteritidis; provided*: that such sample collection and testing will not be performed if the flock or house is participating in a voluntary program approved by the Administrator to control *Salmonella enteritidis* serotype *enteritidis*. If one or more manure or egg transport machinery samples collected and tested in accordance with the provisions of paragraphs (b) (1) and (d) of this section test positive for *Salmonella enteritidis* serotype *enteritidis*, the flock or house from which the sample was taken shall be determined to be a test flock or test poultry house. If one or more internal organ samples collected and tested in accordance with the provisions of paragraphs (c) (2) and (d) of this section test positive for *Salmonella enteritidis* serotype *enteritidis*, the flock or house from which the sample was taken shall be determined to be an infected flock or infected poultry house. If the person in control of the flock or poultry house has refused to schedule sample collection within 48 hours of the time a Federal or State representative requests such sample collection, or has refused to allow completion of sample collection according to the schedule set by the Federal or State representative, the flock or poultry house shall be determined to be in test status.

§ 82.33 Interstate movement or export of articles from test poultry houses, test flocks, infected poultry houses, and infected flocks.

Eggs, live chickens, cages, coops, containers, troughs and other equipment, and manure may be moved interstate from a test poultry house, test flock, infected poultry house, or infected flock only in accordance with this section.

(a) Eggs that are crushed and denatured or otherwise denatured to deter their use as human food in accordance with 7 CFR part 59 may be moved interstate from a test poultry house, test flock, infected poultry house, or infected flock without further restriction under this subpart; *except that*, if the restricted eggs are destined for use as a protein or mineral supplement in animal feed, the eggs may be moved interstate only for pasturization. Other eggs may be moved interstate from a test poultry house, test flock, infected poultry house, or infected flock only for pasteurization at an egg products plant inspected by the Agricultural Marketing Service in accordance with 7 CFR part 59, or for hard cooking at an egg products plant operating under the Agricultural Marketing Service Voluntary Egg Products Inspection Service in accordance with 7 CFR part 55, or directly to a port for export from the United States. Such eggs may only be moved if:

(1) A permit has been obtained for the interstate movement or export in accordance with § 82.35 of this subpart, and

(2) The eggs are moved in a completely enclosed compartment of a vehicle that has had a seal applied to it by a Federal or State representative [4] immediately prior to movement.

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[4] The location of Federal or State representatives can be obtained by writing to the Administrator, c/o Sheep, Goat, Equine,

Such eggs may not be unloaded during transit. For eggs moved to an egg products plant, a Federal or State representative shall break the vehicle's seal at the plant. If the Federal or State representative finds that the cargo compartment of the vehicle is contaminated with material from broken eggs, or other material or litter that could spread *Salmonella*, he or she shall order the operator of the vehicle to clean and disinfect the compartment in accordance with § 71.7 of this chapter prior to the time the vehicle leaves the premises of the egg products plant.

(b) Live chickens may be moved interstate from a test poultry house, test flock, infected poultry house, or infected flock only if:

(1) A permit has been obtained for the interstate movement in accordance with § 82.35 of this subpart;

(2) The chickens are moved interstate to a Federally inspected slaughtering establishment;

(3) The chickens are slaughtered within 24 hours of arrival at the Federally inspected slaughtering establishment; and

(4) The wheels and exposed surfaces of the vehicle used to move the chickens are cleaned and disinfected in accordance with § 71.7 of this chapter after the chickens are unloaded and prior to the time the vehicle leaves the premises of the slaughtering establishment.

(c) Cages, coops, containers, troughs, and other equipment may be moved interstate from a test poultry house, test flock, infected poultry house, or infected flock only if:

(1) A permit has been obtained for the interstate movement in accordance with § 82.35 of this subpart;

(2) The equipment is made of hard plastic or metal,

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and Poultry Diseases Staff, Veterinary Services, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782.

(3) The equipment has been cleaned and disinfected in accordance with § 71.7 of this chapter,

(4) The equipment was inspected by a Federal or State representative after it was cleaned but before it was disinfected, and then was disinfected in the presence of a Federal or State representative; and

(5) The wheels and exposed surfaces of the vehicle used to move the equipment are free of manure at the time the equipment leaves the premises of the test or infected poultry house.

(d) Manure may be moved interstate from a test poultry house, test flock, infected poultry house, or infected flock only if: A permit has been obtained for the interstate movement in accordance with § 82.35 of this subpart; the wheels and exposed surfaces of the vehicle used to move the manure are free of manure at the time the manure leaves the premises of the flock, and the manure is moved interstate for one of the following purposes:

(1) Burial,

(2) Spreading and turning under on fields not used for grazing or poultry production; or

(3) Composting in a covered compost heap for a period of at least one month.

§ 82.34 Interstate movement of hatching eggs and newly-hatched chicks.

No hatching eggs or newly-hatched chicks from egg-type chicken breeding flocks may be moved interstate unless they are classified "U.S. Sanitation Monitored" under the National Poultry Improvement Plan (NPIP), or meet the requirements of a State classification plan determined by the Administrator to be equivalent to the NPIP, in accordance with § 145.23(d) of this chapter. Flocks which

meet this requirement are designated Certified *Salmonella enteritidis* serotype *enteritidis* Tested Free Flocks.

§ 82.35 Issuance of permits.

Permits required by this part may be obtained by the owner of poultry or other items, or the agent of the owner, by applying in writing to a Federal representative.[5] The application shall specify the following: The name and mailing address of the owner of the poultry or other items to be moved, or the name and address of the agent of the owner; the name and mailing address of the person who will receive the poultry or other items; the street addresses of both the origin and destination of the shipment; the number and types of poultry and other items to be moved; and the reason for their movement. An application for a permit to move eggs for export in accordance with § 82.33(a) of this subpart must also include a written statement signed by the exporter stating that the proposed exportation meets the requirements of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 *et seq.*).

§ 82.36 Denial and withdrawal of permits.

(a) *Denial.* If a Federal representative denies a request for a permit, he or she will send the applicant a written notice of the denial, explaining why the permit was denied.

(b) *Withdrawal.* If a Federal representative determines that the holder of a permit is violating either the regulations or a condition specified in the permit, he or she may withdraw the permit by notifying the holder of the permit of its withdrawal, orally or in writing. If the notice was oral, a written notice of the withdrawal, explaining why the permit was withdrawn, will follow.

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[5] See Footnote 4 to § 82.33 of this part.

(c) *Appeals.* Denial or withdrawal of a permit may be appealed in writing to the Administrator within 10 days after receipt of the written notice of denial or withdrawal. The appeal must tell the Administrator what material facts are in dispute. A hearing will be held with respect to any disputed material facts, in accordance with rules of practice which shall be adopted by the Administrator for the proceeding; however, the withdrawal or denial shall continue in effect pending the completion of the proceeding, and any judicial review thereof, unless otherwise ordered by the Administrator.

§ 82.37 Cleaning, washing, and disinfection of depopulated infected poultry houses.

If any infected poultry house is depopulated [6], the poultry house shall be cleaned, washed, and disinfected as follows between the time the poultry house is depopulated and the time the new birds arrive at the premises. All manure and litter must be removed from the house to an isolated area where there is no opportunity for dissemination of disease organisms; all surfaces in the house (except dirt floors) must be scrubbed with hot, soapy water and rinsed; and all surfaces in the house must be sprayed in accordance with the label directions with a disinfectant which is registered by the U.S. Environmental Protection Agency as germicidal, and which is effective against *Salmonella enteritidis* serotype *enteritidis.*[7] The owner or person in control of the infected poultry house must re-

[6] Upon request of the flock owner, APHIS will conduct environmental testing for *Salmonellae* of depopulated poultry houses between the time they are disinfected and the time they are restocked.

[7] A list of some disinfectant solutions registered by the U.S. Environmental Protection Agency as germicidal that are effective against *Salmonella enteritidis* serotype *enteritidis* may be obtained by writing to the Administrator, c/o Sheep, Goat, Equine, and Poultry Diseases Staff, Veterinary Services, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782.

quest a Federal or State representative to inspect the poultry house after it is disinfected but before it is restocked with new chickens, and cleaning, washing, and disinfection shall not be considered completed until the Federal or State representative determines the procedures have been properly performed.

§ 82.38 Monitoring other poultry houses on premises containing infected poultry houses; monitoring poultry houses released from infected poultry house status.

(a) This paragraph applies to any poultry house that is in test poultry house status at any time when any other poultry house on the same premises is in infected poultry house status. If any such test poultry house is released from test poultry house status in accordance with § 82.32 (b) (2) of this subpart, the poultry in the former test poultry house will be tested a third time with the blood and internal organ tests required by § 82.32 (c) and (d) of this subpart, within 45 to 60 days following the date the house was released from test house status. If this blood and internal organ monitoring test has positive results, the poultry house will be determined to be an infected poultry house in accordance with § 82.32 (c) and (d) of this subpart.

(b) All other poultry houses on a premises containing an infected poultry house, except any test poultry house, shall undergo monitoring tests as follows from the date the flock owner is notified of the determination of an infected house until 120 days after the date infected house status is removed from all poultry houses on the premises. A Federal representative or State representative shall collect manure and egg transport machinery samples from each house in accordance with § 82.32 (b) of this subpart, at intervals of not less than 45 days and not more than 60 days. If the samples from any house test positive in accordance with § 82.32 (d) of this sub-

part, that house shall be determined to be a test poultry house in accordance with § 82.32(b) of this subpart.

(c) The poultry in any infected poultry house that is released from infected poultry house status in accordance with § 82.32(e) of this subpart must be tested a third time with the blood and internal organ test required by § 82.32(c) of this subpart, within 45 to 60 days following the date the house was released from infected poultry house status. If this blood and internal organ monitoring test has positive results, the poultry house will be determined to be an infected poultry house in accordance with § 82.32(c) of this subpart.

(2)

No. 91-1879

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

ROSE ACRE FARMS, INC., PETITIONER

v.

EDWARD MADIGAN, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the Claims Court is the appropriate forum to resolve petitioner's claim for compensation assertedly due under the Takings Clause of the Fifth Amendment and 21 U.S.C. 114a and 134a(d).

2. Whether, under the Fifth Amendment and 21 U.S.C. 114a and 134a(d), petitioner must be compensated for losses allegedly incurred under regulations restricting the interstate movement of eggs and chickens linked to salmonella poisoning of humans.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-14a, is reported at 956 F.2d 670. The opinion of the district court, Pet. App. 15a-46a, is unreported.

JURISDICTION

The court of appeals entered judgment on February 10, 1992. Pet. App. 1a. The court of appeals denied a petition for rehearing on February 26, 1992.

Pet. App. 50a. The petition for a writ of certiorari was filed on May 22, 1992. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

Petitioner Rose Acre Farms, Inc. challenges federal regulations restricting interstate movement of table eggs and chickens linked to salmonella poisoning in humans.

1. Salmonella enteritidis (salmonella) is a communicable disease that poses a serious threat to public health. In healthy adults, salmonella can produce violent illness requiring hospitalization for severe fever, diarrhea, and vomiting. Pet. App. 1a. In elderly people, children, and persons with immune systems weakened from other diseases, it can be fatal. *Ibid.*

Contaminated eggs pose a particularly significant risk of causing salmonella in people. In theory, proper handling and cooking of eggs can prevent disease. In practice, that does not always happen. Some people continue to use raw eggs in caesar salads, hollandaise sauce, and other dishes that are prepared in ways that will not kill the bacteria. In other instances, the eggs are simply mishandled, improperly stored, or inadequately cooked. Pet. App. 2a.

The health risks are compounded in nursing homes, cafeterias, hotel kitchens, restaurants, and other places where food is prepared in large quantities. In these institutional settings, many eggs may be pooled together. As salmonella multiplies rapidly, the bacteria from a single infected egg can contaminate the entire dish. Pet. App. 2a. Thus, in a very literal sense, it takes only one bad egg to make hundreds of people seriously ill.

In recent years, there has been a sharp increase in the incidence of salmonella food poisoning. Scientific studies indicate that the increase may be linked to the development of an unusually invasive strain of salmonella that may be causing chickens to lay eggs that are contaminated with salmonella before the eggs shell is even formed. Pet. App. 2a. Such infections pose substantial risks for public health and the poultry industry. If chickens are laying eggs that are contaminated with salmonella before the shell is even formed, more contaminated eggs will enter the marketplace and more people will be placed at risk of contracting salmonella. And if a more invasive strain of salmonella is responsible for the upswing in salmonella outbreaks, then the spread of the bacteria from one poultry flock to another would multiply economic losses for the entire poultry industry.

2. Several overlapping statutory provisions vest the Secretary of Agriculture with broad authority to combat communicable diseases of livestock and poultry. The Secretary has the authority to "make such regulations and take such measures as he may deem proper to prevent the introduction or dissemination of the contagion of any contagious, infectious, or communicable disease of animals and/or live poultry." 21 U.S.C. 111. He is similarly authorized to "control and eradicate any communicable diseases of livestock or poultry." 21 U.S.C. 114a; see also 21 U.S.C. 120, 123, 134a.

On February 16, 1990, the Secretary invoked these remedial powers and determined that emergency regulatory measures were necessary to identify chicken flocks infected with salmonella and to control the spread of the disease. 55 Fed. Reg. 5576 (1990). The Secretary noted that salmonella infection was preva-

lent among northeastern and mid-Atlantic flocks, and spreading to other flocks in midwestern and northwestern states. 55 Fed. Reg. 5580 (1990). Citing public concerns about egg safety and the growing number of salmonella outbreaks in people, the Secretary stated that immediate regulatory action was necessary to prevent harm to the poultry industry and the public. *Ibid.* He accordingly published interim regulations, effective immediately and in advance of public comment, to identify infected flocks and to control the spread of the disease to poultry and people.[1]

The regulations establish a three-step process for determining whether chicken flocks pose a risk of spreading salmonella infection. State and federal investigators first determine whether eggs are the probable cause of a reported outbreak of salmonella in humans. If eggs are implicated in the outbreak, they are then traced back through the chain of distribution to the laying flock. That flock is designated a "study flock." 56 Fed. Reg. 3740 (1991).

Investigators then test for salmonella in the study flock's environment by analyzing samples from the manure and egg transport machinery of each poultry house within the flock. If salmonella are recovered from the samples, the flock is designated a "test" flock and subjected to additional testing. Eggs, chickens, and articles associated with the production process (such as feed and chicken coops) may not be freely shipped in interstate commerce while this additional testing takes place. However, eggs subject to these restrictions may move in interstate commerce

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[1] After a subsequent notice and comment period, the Secretary promulgated final regulations on January 30, 1991. See 56 Fed. Reg. 3730 (1991), codified at 9 C.F.R. 82.30-82.38.

if destined for pasteurization, hard boiling, or foreign export. 56 Fed. Reg. 3740-3741 (1991).

In the final stage of the testing process, blood and internal organs are taken from a sample of chickens within the "test" flock and analyzed for the presence of salmonella. If the salmonella analysis of blood and internal organ samples is negative on two successive occasions, the affected flock or poultry house is released from further restrictions. If the tests are positive for salmonella, however, then the flock or house is designated as "infected." The restrictions on interstate commerce will then remain in effect until the houses have been depopulated, cleaned, washed, and disinfected in accordance with federal guidelines or until further testing indicates salmonella are not present in organ samples. To guard against reinfection, a house or flock that is released from infected status remains subject to further testing for a period of 18 months, unless the egg producer is participating in a voluntary program of salmonella control that has been approved by the Secretary. 57 Fed. Reg. 776, 779 (1992).

3. The Secretary has statutory authority to provide monetary compensation to livestock and poultry producers who incur economic losses as a result of regulatory actions undertaken to prevent the spread of communicable diseases. Section 114a of Title 21 provides that the Secretary's power to control and eradicate communicable diseases of poultry includes authority for "the payment of claims growing out of destruction of animals (including poultry), and of materials, affected by or exposed to any such disease, in accordance with such regulations as the Secretary may prescribe." Similarly, Section 134a(d) of Title 21 provides that, with exceptions not relevant here:

> the Secretary shall compensate the owner of any animal, carcass, product, or article destroyed pursuant to the provisions of this section [*i.e.* 21 U.S.C. 134a]. Such compensation shall be based upon the fair market value as determined by the Secretary, of any such animal, carcass, product, or article at the time of the destruction thereof.

The Secretary concluded that neither provision warranted payment of compensation to producers whose eggs and chickens were subject to restrictions under the salmonella regulations. 56 Fed. Reg. 3731 (1991). The Secretary noted that the applicable statutes require payment of compensation if the government orders *destruction* of animals or animal products. *Ibid.* He also noted that the statutes and regulations in some cases permit compensation if owners voluntarily destroy animals or animal products to further a regulatory program aimed at limiting communicable diseases. *Ibid.* The Secretary determined, however, that destruction of chickens was not necessary to further the goals of the salmonella program. *Ibid.* He explained that salmonella bacteria could not be eradicated by destroying affected chicken populations, principally because the bacterial agent is not host specific, but is, instead, found in many other species throughout the environment. *Ibid.* Accordingly, the salmonella program did not seek to eradicate the disease, but was instead intended only to control the spread of salmonella in egg-type breeding and production flocks—a goal that in the Secretary's judgment could be furthered through actions short of ordering destruction of the affected flocks.

In addition, the Secretary explained that indemnity payments were reserved for instances in which the nature of the disease or the federal regulatory action

causes severe and widespread economic impact on the affected agricultural industry. 56 Fed. Reg. 3731 (1991). The Secretary determined that such circumstances were not present here because: (1) the disease does not cause severe mortality or reductions in productivity in affected flocks; and (2) the regulatory scheme mitigated the economic impact on producers by permitting restricted eggs to be sold in other markets and by limiting the restrictions to separate, individual poultry houses within the larger flock. *Ibid.*

4. Enforcement of these regulations linked petitioner's chicken farms to three outbreaks of salmonella poisoning. In Chicago, 400 otherwise healthy adults contracted salmonella while attending a convention. More than 100 required hospitalization. State and local health investigators concluded that eggs from petitioner's White County farm were the probable source of the illness. Pet. App. 19a. Petitioner's eggs were also linked to a salmonella outbreak that felled 42 wedding guests in Kentucky, and to a third salmonella outbreak among two Tennessee families. *Id.* at 19a-20a. Poultry houses at three of petitioner's farms were eventually found infected with salmonella, and a portion of petitioner's production was barred from the interstate table egg market. *Id.* at 18a-20a.

On December 28, 1990, petitioner filed a complaint in district court for a preliminary injunction and for a declaratory judgment invalidating the regulatory scheme. The district court, after consolidating the preliminary injunction hearing with a trial on the merits, held that the regulations are legally defective because they deny egg producers compensation for economic losses. Pet. App. 48a. The court

first rejected respondents' contentions that the Claims Court has exclusive jurisdiction over petitioner's claims that the statute and the Fifth Amendment require monetary compensation for economic losses caused by the regulatory scheme. *Id.* at 38a-39a. The court acknowledged that petitioner provided evidence of losses of $50,000 per day and that claims for such compensation could be brought only in the Claims Court. *Id.* at 38a. The court reasoned, however, that the complaint did not in fact seek money damages but only demanded a declaratory judgment to the effect that compensation would be required under the applicable statutes and the Takings Clause of the Fifth Amendment. *Id.* at 38a-39a. The court therefore assumed equitable jurisdiction.

On the merits, the district court held that 21 U.S.C. 114a and 134a both require payment of compensation. The court reasoned that the regulations effect a condemnation of restricted eggs and chickens by destroying their economic value—a result that, in the district court's view, was tantamount to the destruction of the chickens and eggs, and that therefore triggers a statutory obligation to provide compensation for government-ordered destruction of animals and animal products. Pet. App. 44a-46a. In addition, the court reasoned that the administrative record and trial testimony indicate that the salmonella regulations could have a severe effect upon the poultry industry, and that the Secretary's decision not to provide compensation in light of such economic injuries was arbitrary and capricious. *Ibid.* The court concluded that, in the absence of a provision for indemnification, the regulations violate applicable statutes and the Fifth Amendment. *Id.* at 46a. It also found that that the Secretary might not have

established the entire regulatory scheme if obligated to provide compensation. *Id.* at 45a. Consequently, the court found that a defect in the indemnification provisions of the regulation would be fatal to the entire regulatory scheme. On that basis, the district court declared the entire regulatory scheme invalid and barred the Secretary from imposing any restrictions on Rose Acre's shipment of eggs from flocks that have previously been linked to salmonella poisoning of humans. *Id.* at 46a, 48a-49a.

5. The court of appeals reversed. Pet. App. 1a-14a. It held that the district court, in invalidating the regulatory scheme for failure to provide compensation, had imposed a remedy that did not fit the alleged violation. The court reasoned that, if pertinent statutes or the Constitution in fact require compensation, then the appropriate remedy is to order compensation paid—relief that in this case could only be afforded by the Claims Court. *Id.* at 5a-8a.[2] The court thus held that petitioner had brought its claims concerning an asserted right to compensation in the wrong forum. *Id.* at 8a. The court therefore did not reach the merits of petitioner's claims that the pertinent statutes and the Takings Clause required payment of compensation for damages caused by the salmonella regulations. *Id.* at 6a, 14a.[3]

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[2] The court of appeals recognized that, under 28 U.S.C. 1346(a), district courts do have jurisdiction to award less than $10,000 against the United States. Pet. App. 5a. It indicated, however, that petitioner's claims would exceed that amount and thus could be entertained only by the Claims Court. *Ibid.*

[3] The court of appeals also held that the Secretary has authority to regulate animal diseases that pose a greater health risk to humans than to the animals themselves; that

ARGUMENT

1. Petitioner principally argues that the court of appeals erred by usurping the Secretary's discretion to evaluate the costs and benefits of the regulatory scheme, Pet. 12-16, and by misapplying the law on whether an invalid regulatory provision may be severed from other provisions of the challenged regulatory scheme, Pet. 16-20. Petitioner thus asserts that, since the current regulatory scheme was adopted on the assumption that compensation would not be paid to regulated producers, a reviewing court, on determining that compensation should be paid, must set aside the entire regulatory scheme in order to ensure that the Secretary retains the authority to make congressionally delegated policy and regulatory determinations.

Those arguments rest on a fundamental misunderstanding of the holding below and focus on issues that are neither ripe for review nor fairly implicated by the court of appeals' decision. The court of appeals ruled that petitioner's claimed entitlement to monetary compensation could be entertained only by the Claims Court. Pet. App. 8a. The court of appeals therefore explicitly declined to decide whether the pertinent laws or the Takings Clause require compensation. *Id.* at 6a, 14a. It is therefore odd for petitioner to claim that the decision below improperly divests the Secretary of authority to determine whether the salmonella regulations should remain in force if the government must pay compensation, since

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the Secretary's regulations set forth a rational means of addressing the health risks posed by eggs contaminated with salmonella; and that the regulations requiring environmental monitoring of poultry houses located on the same premises as an infected house are lawful. Pet. App. 8a-13a. Petitioner has not challenged those rulings in this Court.

the court of appeals did not rule that compensation is necessary, and its holding *precludes* the district court from even entertaining the question in the circumstances of this case.

The court of appeals did state in a brief dictum that if compensation were deemed required it would be "inappropriate to halt the regulatory program." Pet. App. 7a. But as no court has in fact made such a determination, issues concerning whether the court must invalidate the entire regulatory scheme or instead sever the "no compensation" administrative determination are not ripe for review. Consequently, the principal issues raised by the petition for a writ of certiorari are not implicated by the holding below and do not merit review by this Court.[4]

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[4] While the issue is not presented by the holding below, we note that the court of appeals was correct in stating that it would be inappropriate to invalidate the entire regulatory scheme if the statutes or the Constitution were found to require compensation. This Court has held that "[o]nce a court determines that a taking has occurred, the government retains the whole range of options already available—amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain." *First Lutheran Church* v. *Los Angeles County*, 482 U.S. 304, 321 (1987). Thus, the court of appeals was correct in suggesting that a determination that the Constitution requires compensation would not afford any basis for invalidating the entire regulatory scheme.

Principles governing the severability of regulatory provisions direct the same result with respect to petitioner's claim that the salmonella regulations misconstrue statutory provisions governing compensation. Regulations should ordinarily be treated as severable unless: (1) there are affirmative indications of a contrary intent; or (2) severing the defective provision would impair the functioning of the underlying statute. *K Mart Corp.* v. *Cartier Inc.*, 486 U.S. 281, 294 (1988). Contrary to petitioner's contentions, the administrative record does not demonstrate that the Secretary would not

2. The ruling below that petitioner's compensation claims may be entertained only by the Claims Court is consistent with *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988). In *Bowen*, the Court made clear that, under 5 U.S.C. 704, the existence of a Tucker Act monetary remedy would, for certain claims, oust the district courts of the equitable review powers that are otherwise conferred by the Administrative Procedure Act (APA). The APA generally provides for review of agency action made reviewable by statute and for review of final agency action for which there is no adequate remedy at law. See *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967). To that end, the APA specifically waives the United States' sovereign immunity from suits for equitable relief by providing that:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed * * * on the ground that it is against the United States [5 U.S.C. 702].

The APA, however, by its terms applies only where "there is no other adequate remedy in a court." 5 U.S.C. 704.

In *Bowen*, the Court held that 5 U.S.C. 704 excludes from APA review claims based on money mandating

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have undertaken this regulatory program if the government were required to compensate egg producers for economic loss. And even if a reviewing court were to conclude that compensation is required, the "no compensation" provision could be severed from the regulation without intruding upon the Secretary's discretion to determine, for subsequent cases, whether the regulations should remain in force.

provisions that: (1) fall within the Claims Court's Tucker Act jurisdiction; (2) "provide compensation for specific instances of past injuries or labors"; and (3) establish rights that can be fully redressed without resort to the type of injunctive and declaratory powers that have been withheld from the Claims Court, but that are generally vested in a district court. 487 U.S. at 900-901 n.31. The Court concluded that for such claims, "suits under the Tucker Act in the Claims Court offer precisely the sort of 'special and adequate review procedures' that [APA] § 704 requires to direct litigation away from the district courts." *Ibid.*

The compensation claims pressed by petitioner fall squarely within this category, for several reasons. First, the Tucker Act confers jurisdiction over petitioner's statutory and constitutional claims for compensation. Similar claims have been routinely adjudicated by the Claims Court and its predecessor, the Court of Claims. See, *e.g.*, *Julius Goldman's Egg City* v. *United States*, 697 F.2d 1051 (Fed. Cir. 1983); *Loftin* v. *United States*, 6 Cl. Ct. 596 (1984), aff'd, 765 F.2d 1117 (Fed. Cir. 1985). Second, the provisions of law on which petitioner relies—the Takings Clause and 21 U.S.C. 134a(d)—provide a right to indemnification for a specific past injury: monetary loss resulting from the destruction of animals or related products pursuant to an order issued under the Secretary's regulatory authority to control communicable diseases. They are money-mandating provisions that authorize compensatory relief for past injuries—precisely the type of laws identified in *Bowen* as falling within 5 U.S.C. 704. See 487 U.S. at 900-901 n.31, 905-906 n.42.

Third, a monetary remedy in the Claims Court is sufficient to afford complete redress for the compensa-

tion rights conferred by the Constitution and the laws. *Bowen* suggests that, in some circumstances, the need for prospective relief governing the relationship between the federal government and other parties would render the Claims Court remedy inadequate. 487 U.S. at 905. But the Claims Court could provide an adequate remedy for all petitioner's claims for compensation. The Claims Court, for example, can supply a fully adequate remedy for petitioner's Takings Clause claim. In fact, this Court has held that equitable relief is not available where a suit for compensation can be brought against the government, *Ruckelshaus* v. *Monsanto*, 467 U.S. 986 (1984), and a compensation remedy under the Tucker Act for a taking is presumed to be available unless there are unambiguous indications to the contrary, *Preseault* v. *ICC*, 494 U.S. 1 (1990). Accordingly, an award of compensation by the Claims Court for petitioner's takings claim is not just an "adequate" remedy, it is the only remedy made available by Congress.

The Claims Court could also provide a fully adequate remedy for petitioner's statutory compensation claims. In many respects a money judgment from the Claims Court affords a *superior* remedy to the declaratory relief sought by petitioner. The Claims Court has long experience and special expertise in valuing money claims against the government, and it can enter a money judgment disposing of the *entire* case. A declaratory judgment, in contrast, leaves the critical question of the amount of compensation actually due unresolved, thereby raising the possibility that complete resolution of petitioner's claims would not be achieved until it exhausts a second, duplicative round of judicial review.[5]

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[5] Petitioner has in fact filed a complaint in the Claims Court seeking an award of compensation for losses allegedly in-

3. The decision below does not conflict with the cases cited by petitioner. Neither case involved the laws or programs at issue here; nor do they reflect any disagreement about the proper application of the jurisdictional principles set forth in *Bowen* v. *Massachusetts*.

Esch v. *Yeutter*, 876 F.2d 976 (D.C. Cir. 1989), involved the Secretary of Agriculture's decision partially to suspend a farmer's participation in a farm subsidy program. The court held that suit challenging the suspension could be brought in district court. The court found that plaintiff's claim was not predicated on a statute mandating monetary compensation for past injuries and also did not clearly fall within the Claims Court's jurisdiction. *Id.* at 984-985. Thus, unlike this case, *Esch* involved claims that could not be adequately redressed under the Tucker Act. *Zellous* v. *Broadhead Associates*, 906 F.2d 94 (3d Cir. 1990), is distinguishable for similar reasons. There, the court of appeals held that a claim for money assertedly due under a federal housing assistance program could not be characterized as a claim for monetary damages. *Id.* at 96-100. The court held that, although the claim sought an order directing the United States to pay out money, district court review under 5 U.S.C. 702 was not foreclosed by the requirement of 5 U.S.C. 704 that there be "no other adequate remedy in a court." 906 F.2d at 99.

4. Petitioner repeatedly asserts, without explanation or supporting argument, that the regulatory decision against paying compensation is erroneous and unlawful and renders the regulations invalid in their

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curred under the salmonella regulations. *Rose Acre Farms, Inc.* v. *United States*, No. 92-335 C (Cl. Ct.) (filed May 8, 1992).

entirety. Pet. i, 10, 13, 16. As explained above, the court of appeals correctly determined that this claim must be raised in the Claims Court and accordingly did not reach the issue. In any event, petitioner's claim lacks merit.

Petitioner's assertion, Pet. 11-12, 15, that the Secretary has a statutory duty to compensate producers who are adversely affected by the salmonella control program is flawed at every turn. First, petitioner errs in asserting that 21 U.S.C. 134a affords the only statutory authority for imposing restrictions on the shipment of eggs or chickens that carry an infectious disease. Congress, in 21 U.S.C. 111, 114a, and 120, has provided the Secretary independent authority to control and eradicate communicable diseases of poultry without regard to the adequacy of state disease control measures and without ordering the physical destruction of animals and animal products.

Second, the administrative record shows that the Secretary had ample basis for imposing regulatory restrictions that stopped short of ordering the actual physical destruction of infected eggs and chickens. Petitioner implies that the Secretary irrationally declined to direct the destruction of infected chickens in order to avoid the mandatory compensation provisions of 21 U.S.C. 134a(d). The Secretary, however, expressly determined that: (1) restrictions on interstate shipments of potentially infected eggs and chickens were adequate to prevent the spread of disease; (2) a program of mandatory destruction would not provide significant additional protection in light of the prevalence of salmonella in the environment and the mode of disease transmission; and (3) the economic impact on the industry would be ameliorated by the availability of alternative markets, the rela-

tively limited scope of the regulatory restrictions, and increased consumer confidence. 56 Fed. Reg. 3731 (1991). The salmonella regulations thus reflect a reasoned choice of regulatory alternatives that is well within the Secretary's discretion.

Finally, regulatory restrictions that permit egg production to be sold for pasteurization, hard-boiling, or foreign export do not "destroy" chickens and eggs or otherwise give rise to a right to compensation under the pertinent statutes. The indemnification provisions at issue, 21 U.S.C. 114a and 134a(d), explicitly make indemnification contingent on the actual "destruction" of animals or animal products. The ordinary meaning of the term generally is "to ruin completely" or "[t]o ruin the structure, organic existence or condition of a thing; to demolish; to injure or mutilate beyond possibility of use." *Black's Law Dictionary* 449 (6th ed. 1990); see also *Webster's Third New International Dictionary* 615 (1986). If, as petitioner implies, Congress had intended to make producers whole for any economic loss incurred in a disease control program, Congress would have said so expressly. The plain text of the statutes, however, authorizes compensation in far narrower circumstances that do not apply to this case.[6]

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[6] In passing, petitioner claims that the regulations violate the Fifth Amendment. Pet. i, 13 n.10. That claim does not warrant reivew by this Court. As an initial matter, petitioner has not adequately preserved that claim. The Questions Presented do not ask the Court to review such a claim; the petition does not discuss or even make reference to any of this Court's Takings Clause cases; and the assertion that the Constitution requires compensation is unsupported by argument or legal explanation. The court of appeals also did not address that claim, and this Court should not do so in the first instance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 91-1879

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

ROSE ACRE FARMS, INC.,
Petitioner,

v.

EDWARD MADIGAN, SECRETARY OF AGRICULTURE OF THE UNITED STATES, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Petitioner Rose Acre Farms, Inc. ("Rose Acre"),[1] respectfully submits this reply brief in support of its Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

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[1] Pursuant to Rule 29.1 of the Rules of the Supreme Court of the United States, Rose Acre incorporates by reference the list of corporate parties appearing on page ii of the Petition for Writ of Certiorari.

THE QUESTIONS PRESENTED ARE RIPE AND MERIT REVIEW

Rather than confront the questions presented by Rose Acre's Petition, the Brief in Opposition attempts to sidestep them. Respondents do not dispute that the first two questions are cert-worthy on the merits.[2] Respondents instead assert that the issues are not ripe or raised by the case. To advance that position, respondents must resort to mislabeling Rose Acre's claim for judicial review of administrative action as a claim for compensation. The magic wand of mislabeling makes Rose Acre's claim disappear from the District Court, and only permits it to materialize in the Claims Court, according to respondents. Mischaracterizing Rose Acre's claim, however, does not do the trick for respondents.

Rose Acre is not asserting a claim for compensation in this case. It is asserting a claim that a regulatory scheme is invalid because it does not provide for statutorily mandated compensation. Rose Acre does have a clear right to compensation under the statute. That right to compensation, however, does not divest Rose Acre of its rights under the Administrative Procedure Act to be free from regulations that are arbitrary, capricious, or otherwise contrary to law. It is the right to be free from such regulations that Rose Acre is asserting in this case to prevent irreparable injury. The government's regulatory scheme unlawfully failed to include a statutorily mandated compensation provision. The fact that a compensation provision is involved does not extinguish Rose Acre's right to challenge the regulations; it simply means

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[2] Regarding the third question presented, respondents' treatment of *Bowen v. Massachusetts*, 487 U.S. 879 (1980), gives new meaning to the term revisionism. Were one to base an understanding of *Bowen* on the description and analysis contained in the Brief in Opposition, one would erroneously conclude that *Bowen* expanded the jurisdiction of the Claims Court. The best refutation of the Brief in Opposition's treatment of *Bowen* and its progeny is a fair reading of the cases.

that unlike some other situations where a party is injured by arbitrary and capricious governmental regulations, Rose Acre has a retrospective remedy for past injuries in addition to its APA remedy to prevent irreparable prospective harm.

The fundamental premise of the Court of Appeals' decision—a premise that permeated its entire analysis—was its holding that even if compensation is required, the regulations should not be set aside. Unwilling to address the arguments raised in the Petition and unable to defend this holding of the Court of Appeals, respondents attempt to dismiss it as "brief dictum." Brief in Opposition at 11. It is dictum and the case is not ripe for review, we are told, because "no court has in fact made . . . a determination [that compensation is required.]" *Id.* In fact, the District Court made just that determination. Pet. App. 39a-46a. The Court of Appeals did not rule on the compensation issue only because of its holding—not dictum—that even if compensation is required, the regulations should stand. The Court of Appeals *should* have decided, as did the District Court, that the statute requires the regulations to provide compensation,[3] that the regulations were promulgated contrary to that requirement and that the entire regulatory scheme is consequently unlawful. The Court of Appeals' refusal to affirm the District Court's judgment on these issues is what this Petition is all about. The questions are plainly ripe and merit review.

Respondents' position is essentially this: While denying that Rose Acre has a right to compensation, respondents maintain that Rose Acre's right to compensation divests it of its right to be free from regulations that are contrary

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[3] It is telling that respondents attempt to resurrect the argument that the restrictions under the SE regulations are not tantamount to an order of destruction. Br. in Opp. at 15-17. The District Court flatly rejected this position. Pet. App. 39a-41a, and 44a-45a, and the Court of Appeals ridiculed it, Pet. App. 4a.

to law, but that Rose Acre has to wait for the Claims Court to tell it that the right to compensation does not exist. The law is not so convoluted or draconian.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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